In the Supreme Court

OF THE

United States

Office Supreme Court, U. S.
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OCTOBER TERM, 1940

No. 696

MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Martin Bekins, deceased; MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Katherine Bekins, deceased; JAMES IRVINE, J. R. MASON, JAMES H. JORDAN, A. HEBER WINDER, as trustee of Eva A. Parrington Trust; C. A. MOSS, and H. E. CURTIS, creditors of Lindsay-Strathmore Irrigation District,

Petitioners,

vs.

LINDSAY-STRATHMORE IRRIGATION DISTRICT, an insolvent taxing agency,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Martin Bekins, deceased; MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Katherine Bekins, deceased; JAMES IRVINE, J. R. MASON, JAMES H. JORDAN, A. HEBER WINDER, as trustee of Eva A. Parrington Trust; C. A. MOSS, and H. E. CURTIS, creditors of Lindsay-Strathmore Irrigation District,

Petitioners,

vs.

LINDSAY-STRATHMORE IRRIGATION DISTRICT, an insolvent taxing agency,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision (R. 595) of the Circuit Court of Appeals for the Ninth Circuit made in the above entitled cause on September 5, 1940, which affirms the interlocutory decree of the District Court for the Southern District of California, Northern Division, rendered against Petitioners on March 11, 1939. (R. 187.)

OPINIONS BELOW.

Opinion of the Trial Court (R. 131), 25 Fed. Sup. 988.

Opinion of the Circuit Court of Appeals (R. 536), 114 Fed. (2d) 680.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered September 5, 1940. (R. 595.) A Petition for Rehearing was filed October 4, 1940 (R. 597 and denied October 15, 1940. (R. 597.) The mandate was stayed until disposition of the case by this Court. (R. 597.) The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., Paragraph 347(a)).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding brought by the respondent Lindsay-Strathmore Irrigation District, a California Irrigation District, for readjustment of its debts under what is now Chapter IX of the Bankruptcy Act of 1898 as amended. (11 U.S.C., Sections 401-404.)

The petitioners own general obligation public bonds of the district in the principal amount of $156,000 (R. 93) with interest from July 1, 1933 partly at 6% and partly at 7%. The principal of the bonded debt of the district involved is $1,427,000.00. Petitioners contend that $123,195.00 of their principal and coupons with interest are in a separate class from all other claims.

The respondent filed its petition in the District Court on September 21, 1937. (R. 5.) A motion to dismiss was granted by the trial Court on December 2, 1937, solely upon the grounds that the statute was deemed unconstitutional. (R. 50.) Thereafter this Court reversed the judgment of dismissal. (*U. S. v. Bekins,* 304 U. S. 27, 58 S. Ct. 811.) The case was subsequently heard and an interlocutory decree was entered by the trial Court on March 11, 1939 (R. 187), and the decision was affirmed by the Court below.

Our view of the case briefly stated.

At the time that this Court rendered its opinion in the former case, holding Chapter IX constitutional, the question as to the nature and character of a Cali-

fornia irrigation district was in some doubt. The Solicitor General and the district both argued in their briefs and orally before this Court, as did Congressman Sumners on behalf of the Judiciary Committee of the House of Representatives, that a California irrigation district did not partake sufficiently of the sovereignty of the State to prevent the application of the Act and that its functions were proprietary and not governmental, and they supported their contentions with citations of California authorities. Since rendition of that opinion, however, the Supreme Court of California has set the matter at rest in the case of *El Camino Irrigation District v. El Camino Land Corporation,* 12 Cal. (2d) 378, 85 Pac. (2d) 123, and subsequent cases, and has unequivocally declared that *all* of the functions of a California irrigation district are *exclusively governmental* and that its property is state property.

This district is not a mere incorporation of landowners—it is the State of California operating through an agency of the Legislature. The preservation and distribution of water for irrigation, the reclamation of land, drainage and flood control is a governmental function when done by the State. This Court has taken note of the importance of irrigation to the general welfare in the arid west. (*Brush v. Commissioner of Internal Revenue,* 300 U. S. 352.) Petitioners now return to this Court with the plea that in view of the *El Camino* case and other later state decisions cited in our brief, and of the separability clause and the provisions of the Act itself, pro-

hibiting interference with governmental powers, and in view of the decision of this Court in the *Bekins* case that Chapter IX is so drawn as to prohibit such interference, Chapter IX simply does not apply to a California irrigation district, and that the decision of the Circuit Court of Appeals is in conflict with the prior holding in *U. S. v. Bekins.* This Court should follow the local law established by recent decisions of the California Supreme Court on the question of the governmental character of this district and hold the Act inapplicable.

The cause is res judicata.

This district with the same plan of composition was in the same District Court under the first Chapter IX (Sec. 80) of the Bankruptcy Act back in 1935. The District Court entered its decree in that case confirming the identical plan here involved. (R. 452.) An appeal was taken to the Circuit Court of Appeals where the decision was reversed (R. 469) and judgment of dismissal was entered below (R. 470), the judgment becoming final. (R. 470.) However, the decree confirming the plan of composition in the case became binding upon all bondholders except the petitioners in the instant case. *Chicot County Drainage District v. Baxter State Bank* (308 U. S. 371).

The factual situation.

The Lindsay-Strathmore Irrigation District is situated in Tulare County, California, and has an area of 15,250 acres. Approximately 9000 acres of this area are highly improved and consist principally of

8300 acres of citrus acreage. The district has no water for the remaining acreage (R. 386), and this area has been owned by the district for a considerable length of time and is rented for pasture. The Court erred in attributing the ownership of this land by the district to the tax situation.

The bond issues of the district consist of a first issue of $1,192,000 of coupon bonds bearing interest at 6%, dated July 1, 1916, and maturing from 1933 to 1946, and of a second issue of $235,000 of coupon bonds bearing interest at 6%, dated October 1, 1918, and maturing from 1933 to 1948. (R. 6-7.) The debt as of October 1, 1937 as stated in the petition consists of these two bond issues, plus the unpaid interest amounting to $439,085.15, a total of $1,866,085.15. The total matured and unpaid obligations on October 1, 1938 amounted to $967,920.57. The district quit paying its maturing principal and interest shortly after July 1, 1933.

In 1932 the district levied the full amount required by Section 39 of the California Irrigation Districts Act, which section is set forth in the appendix. (p. iii.) On July 1, 1933 it did not have sufficient money collected to pay its maturing obligations. It applied to the Districts Securities Commission for an order permitting it to levy assessments pursuant to Section 11 of the Districts Securities Commission Act which section is set forth in the Appendix (p. i) and provides for assessments not in accordance with the obligations which mature, but in accordance with a determination, made without notice, as to the ability

of the lands to pay. This legislation is in the form of moratorium legislation.

Shortly thereafter a refunding plan was proposed to the bondholders and an application made to the Reconstruction Finance Corporation (hereinafter referred to as the R.F.C.) for a loan in October 1933 under the provisions of Section 36 of the Emergency Farm Mortgage Act. (Title 43, U.S.C., Section 403.) The R.F.C. granted a loan to the district on May 16, 1934 in the amount of $859,000, prior to the enactment of the first municipal bankruptcy act. An 85% deposit of bonds was obtained before the prior petition was filed under Section 80. (R. 260.) The petition was heard November 18, 1935 (R. 423) and disbursal of the loan was made April 29, 1937 at the rate of 59.978 cents on the dollar of principal as the plan provides and in addition thereto interest was paid to the depositing bondholders at the rate of 4% on the disbursal price from November 1, 1934, or the date of deposit by each bondholder, until disbursal of the loan by the R.F.C., and has been paid subsequently at the same rate to the R.F.C. Only the petitioners have received no interest. They have been deprived of interest since 1933. Approval of this discrimination by the Courts below is cited as error.

Procedure for liquidation of deposited bonds.

The original bondholders deposited their bonds under escrow agreements (R. 254) and authorized the depositary to surrender the bonds "upon such payment therefor" to the district or its agent or the

R.F.C. or any agency of the United States entitled thereto and provided that the bondholder "consents to and accepts the plan of refinancing and readjustment".

Attached to these instructions was a receipt by the district in which the district "acknowledges receipts of the foregoing described bonds" as held subject to the instructions. (R. 254, 259.) The district appointed one Alvin M. Hostetter to receive delivery of the deposited bonds from the bank. (R. 263.) Hostetter executed a trust agreement dated April 29, 1937 (R. 266), reciting that he is owner of the original bonds and is willing to make them available for refinancing and in the trust agreement Hostetter appointed a dummy, one W. J. Burns, of Phoenix, Arizona, with authority to execute a note and trust deed and purportedly sold, transferred and delivered to Burns as trustee the bonds of the district, and authorized him to receive the proceeds of the R.F.C. loan and provided that upon receipt of the proceeds from Burns, Hostetter was to have no further "right, title or interest in any of the bonds". Thus Hostetter and the original bondholders cancelled out all of their beneficial interest in the bonds and thereafter Burns acts in no respect on behalf of Hostetter or the original bondholders. In this respect the mechanics of the transaction differ from that in the case of *Luehrmann v. Drainage District No. 7, of Poinsett County, Ark.*, 104 Fed. (2d) 697, in which this Court denied certiorari. (*Haverstick v. Drainage District No. 7*, 308 U. S. 604.) In that case the Circuit Court said:

> "The trustee Chapman, acting for the bondholders who had accepted the original offer, filed acceptance of the proposed plan;" (700)

and further:

> "For this reason we think these classes of bondholders and judgment creditors so far retained their original status as entitled them to be counted as acceptors of this composition plan." (701.)

In the first decision of the trial Court in that case the Court denied the motions to dismiss and declared:

> "In this particular case, however, no agency of the government holds the old securities, but they are in fact held by a trustee who appears to have taken over legal title from the original bondholders, the larger portion of whom transferred the bonds to the trustee through the agency of the Bondholders' Protective Committee. Other bonds purchased later went into the hands of the trustees by the act of the original bondholders in delivering the bonds to the trustee, and were placed as collateral to the trustee's note, just as in the first instance. The judgment creditors assigned their judgments without recourse direct to the trustee."
>
> *In re Drainage District No. 7 of Poinsett County, Ark.,* 21 Fed. Supp. 798, 801.

In the *Luehrmann* case the Court bases its decision upon the question of consent on the basis that the original bondholders had come into the new case and given their consent and that they had a sufficient

interest in the bonds to consent, whereas in the instant case the theory of the decision seems to be that the R.F.C. by reason of Subdivision (j) of Section 83 and the other provisions of the Municipal Bankruptcy Act, which state that any agency of the Government having an interest in bonds has its interest at the full face amount, can import validity to the consent.

The R.F.C. agreement with the district (the resolution granting the loan) (R. 202) provided that the bondholders might appoint an agent who would make a note to the R.F.C. This procedure was not carried out. Burns certainly was not an agent of the original bondholders.

Under the trust agreement Burns was to receive no compensation and was not to be liable on the notes to the R.F.C. The collateral note of Burns to the R.F.C. (R. 272) identifies Burns as a trustee, but does not say for whom he is trustee. In fact in no place in any of these transactions is there any provision for a beneficiary of the interest in the original bonds over and above the amount of the R.F.C. loan. Burns acknowledges himself as bound to the R.F.C. in the amount of the loan plus 4% interest. While the R.F.C. is authorized to collect the collateral and to sell the collateral, the note provides that the R.F.C. can apply all cash proceeds first to the payment of expenses, second to the payment of interest, third to the payment of principal, and fourth "any balance remaining shall be paid to the maker hereof as Trustee, or to the person or persons law-

fully entitled thereto". But the trustee has no interest in the collateral and Hostetter and the original bondholders surrendered their interest and therefore the remaining interest of a beneficial character must belong to the Lindsay-Strathmore Irrigation District. Burns' expenses were paid by Mr. McBride (counsel for the district). (R. 402.) Petitioners' view of the situation is that the Lindsay-Strathmore Irrigation District has a beneficial interest in those bonds. They are "owned, held, or controlled" by said district and cannot be counted in determining whether the percentage of creditors required by Section 83 (d) has been obtained.

Petitioners' view is that by this transaction the R.F.C. became a creditor of *Burns* and not a creditor of the district, and that the only interest of the R.F.C. in the bonds is a limited one, namely the right of a pledgee to collect out of the collateral. Any remaining interest over and above *has been surrendered to and for the benefit of the district.* The loan was made by the R.F.C. as shown by its instructions to the Federal Reserve Bank when the money was advanced (R. 278) "to enable the above named District to refinance its indebtedness". This was not some ultimate purpose, but was the immediate purpose. The purpose of the advance was necessarily to effect an immediate reduction in debt.

If the beneficial interest in these bonds is held by the district then they are bonds "owned, held, or controlled" by the district, and in spite of the provision

in the statute[1] providing that the interest of the R.F.C. is a full interest, the bonds are ineffective as the basis of the requisite consent to the plan. On the other hand, if they are bonds in which the R.F.C. has the full interest, including the beneficial interest, then there was discrimination because the R.F.C. received interest at 4% which is denied the non-depositing bondholders, the petitioners.

Fairness of the plan.

The trial Court in the former bankruptcy proceedings (R. 434) determined that the district comprises 15,234 acres of land. That 9000 acres is planted to orchards of which 8300 is citrus fruits.

> "that the remainder of the land in said district is unplanted and practically all of such remaining land is unirrigated; that 5,256.4 acres of land within said district has been deeded to said district for delinquent assessments thereof, and that the greater portion of said land is not planted to any permanent crop; that the dependable water supply of said district is not sufficient for the proper irrigation of the lands therein that are now planted as aforesaid, and by reason thereof it is impossible for said unplanted lands to be used for any other purpose than grazing or dry farming;"

The trial Court in the instant proceeding said of this acreage:

> "that as the result of such recurring unredeemed delinquencies the District has acquired and now

1. "Any agency of the United States holding securities acquired pursuant to contract with any petitioner under this chapter shall be deemed a creditor in the amount of the full face value thereof." Sec. 82.

owns approximately one-third of the area within the District. Thus as a result of the general depleted condition of the District, two-thirds of the lands therein were expected to bear financial burdens, including the bond service requirements, of the entire area of the District."

"There is little need of mention of the District's financial plight * * *."

In re Lindsay-Strathmore Irrigation District, 25 Fed. Supp. 988, at 990.

This basis of the Court's decision is insubstantial.

The condition of the district as shown December 26, 1935 was that it had assets of over two million dollars. (R. 441.) These are corporate assets, in addition to the power of taxation. Petitioners have conceded that the district technically was not able to pay its obligations as they matured, but they have never conceded that the district is insolvent in the sense that its assets are less than its liabilities.

Exhibit FF which was the financial statement of the district dated October 31, 1935 shows an excess of assets over liabilities of $731,544.06. (R. 480.) When this case was tried under the first bankruptcy act the Court in its findings specifically determined the amount of assets and liabilities, but not so in the instant case. We have an absence of special findings on the question of assets and liabilities. However, the findings of the first trial Court were before the second Court, and the first Court found that the district had a working capital of $735,864.18 over and above its

entire original bonded indebtedness. This is an adjudication.

On the question of assessments it is true that the tax delinquency of the district rose as high as 47%. This was in 1932. But the average delinquency from the years 1931 to 1937, inclusive, even during the year the assessments were collected, was less than 13%.

From 1916 to 1937 the total tax levied was $4,001,773.05 and the actual taxes collected to *date of tax sale* was $3,383,054.65 or but one-half per cent over the normal 15%. (R. 331.) Adding water tolls collected in the amount of $2,515,324.97 (R. 330) the delinquency is in round figures 10%. Under Sections 39f and 55 of the California Irrigation District Act, Cal. Stat. 1925, p. 501, and 1931, p. 246, water tolls may be levied in lieu of assessments and if unpaid become a lien on the land.

The California Irrigation District Act provides for and allows a normal delinquency of 15%. (Sec. 60, California Irrigation District Act.) In other words, the district collected $102.00 for every $100.00 of its budget. Further, if water tolls are added to taxes, the delinquency is insignificant. The resources of the district on September 30, 1938 show a working capital of $771,693.72 which is a surplus over and above the bonded indebtedness of the district and an improvement in the district since the statement of 1935. (R. 348.)

During the last ten years the district has spent approximately one million dollars in litigation, which litigation is now settled. It seems unfair that where

a district has been able to meet this unusual and unexpected expense of a million dollars, amounting to two-thirds of its bonded indebtedness, it should be permitted to cut this bond debt to sixty cents on the dollar principal with nothing for interest. (R. 382, 379.)

Furthermore, during the period of default the district made an investment in capital assets amounting to over $300,000 for water stock and the like. (R. 382.) It deposited $100,000 with the R.F.C. as a surplus or pledge against liability to the petitioners. (R. 383.) It had in addition cash on hand at the end of the season and just before new tax money comes in (September 30, 1938) $121, 332.32. (R. 347.)

Classification of creditors.

The bonds are all general obligation bonds. Sections 52 and 61(a) of the California Irrigation District Act (Appendix pp. vi, vii) provides for the payment of matured bonds and coupons in the order of presentation to the treasurer of the district. When there are not sufficient funds on hand to pay the claims so presented they are registered in the order of presentation and payment is then made in the order of presentation. It is petitioners' contention, therefore, that when bonds and coupons have been so presented, the priority is *provided by law* and attaches to the claim, and such claim should be classified separately in accordance with this order of presentation. The *undisputed* facts in the case are that the petitioners presented their matured bonds and coupons to the treasurer at the times set forth in their respective claims which were

filed in the cause. (R. 392.) The claims of the petitioners show the exact dates of presentation of each matured obligation. (R. 38, 64, 72, 75, 78, 80.) On the other hand, neither the claim of Burns (R. 43) nor that of the R.F.C. (R. 40) claims interest or shows any date of presentation of any matured obligation. The trial Court found at R. 165 that all the indebtedness of the district is payable without preference out of funds derived from the same source and all creditors constitute one class. Although this point of the priority of these registered bonds and coupons was one of the most vital points in the trial of this case and was a subject of a number of amicus curiae briefs in the Circuit Court of Appeals, yet the subject was not even touched upon by that Court in its opinion, except to refer to its opinion filed the same day in the case of *West Coast Life Insurance Co. v. Merced Irrigation District,* 114 Fed. (2d) 654 at 672, where the Court held that Section 52 does not give a *preference by law.* Section 83(b) of the Bankruptcy Act requires separate classification of claims enjoying a preference provided by law. The Court seems to suggest (at page 673) that the bankruptcy power is supreme and rights must be decided by the Bankruptcy Act since it is superior to all State laws upon the subject and that to recognize this claimed priority would defeat the purpose of Chapter IX.

QUESTIONS PRESENTED.

(1) a. Does the Bankruptcy Act extend jurisdiction in bankruptcy over the Lindsay-Strathmore Irrigation District, in light of the holdings of the Supreme Court of California, rendered since the decision in *U. S. v. Bekins,* 304 U. S. 27, to the effect that the functions of a California Irrigation District are exclusively governmental, and considering the Act itself as held by this Court in *U. S. v. Bekins* forbids any interference with the governmental powers of the district? b. After the decision in *U. S. v. Bekins,* the highest Court in California has determined that the property of these districts is state property and in effect, we contend, that they are the state. How then can bankruptcy extend to them under our Constitution?

(2) Is it *res judicata* as we contend, that the plan of composition here presented cannot be made binding upon petitioners? The District Court in a prior proceeding under Section 80 of the Bankruptcy Act has held in compliance with the mandate of the Circuit Court of Appeals as to the identical plan of composition, and between the same parties seeking in substance the same decree, that the attempted enforcement of the bankruptcy plan is unconstitutional as between these parties. Does not the decree thus rendered also determine that the plan is unfair?

(3) Where the bondholders accepted the plan of composition and surrendered their interest in the bonds to a person called a trustee, who is not trustee for the bondholders nor for the R.F.C., and such

trustee executed a note to the R.F.C. to secure a loan of money with which the trustee paid off the former bondholders, can the consent of such a trustee to the plan be counted at the face amount of such bonds?

(4) Where a former decree puts the plan into effect and some parties fail to appeal, is the plan not "executed out of Court" because it is *res judicata* as to such parties?

(5) Where 4% interest, amounting to approximately $150.00 per $1000.00 bond, has been paid to the former consenting bondholders and to the R.F.C., which interest is denied non-consenting bondholders, is there unlawful discrimination and coercion?

(6) Is a plan of composition which offers 60¢ per dollar of principal (and none of the interest) fair and equitable where the undisputed assets of a bankrupt greatly exceed the amount offered to the creditors by the plan of composition, though the district has a present inability to pay its obligations as they mature? May a plan of composition in such a case give to creditors less than the amount of principal due on their claims? Is not the limit of relief extension of time and reduction of interest?

(7) Is a plan of composition accepted in good faith when the consenting bondholders will get exactly the amount they paid for their bonds, and when they decline to comply with Section 83(a) of the Bankruptcy Act requiring a statement of the beneficial interest in the bonds?

(8) When the local law provides that obligations of the district shall be paid in the order of their

presentation to the treasurer after maturity, and the petitioners are the only creditors who have preserved their rights by presenting their matured bonds and coupons to the treasurer and filing their proofs of claim in the bankruptcy court, are such claims preferred by law within the meaning of Section 83(b) of the Bankruptcy Act and must they be recognized in this composition proceeding and classed separately as we contend?

(Additional questions presented are set forth in the Reasons for Granting Writ of Certiorari, which immediately follow.)

REASONS FOR GRANTING WRIT OF CERTIORARI.

There are a number of separate reasons, each falling within the scope of Rule 38, why a writ of certiorari should be granted in this case, which are briefly summarized as follows:

1. This case clearly presents a question of wide public interest, of whether the Municipal Bankruptcy Act (present Chapter IX of the Bankruptcy Act of 1898, as amended, 11 U.S.C.A., Pars. 401-404), applies to a state agency where the highest Courts of the state have repeatedly held that its functions are *exclusively governmental* and that its property is state owned. This Court, in *United States v. Bekins,* 304 U.S. 27, held in effect that this statute was

> "carefully drawn so as not to impinge upon the sovereignty of the state * * *",

and that the Committee on the Judiciary was correct in stating that the statute

> "expressly avoids any restriction on the powers of the states or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted."

The Committee on the Judiciary, as well as this Court, evidently had in mind the provisions of Section 83 (c) (11 U.S.C.A. Sec. 403), which provides that the Court "shall not, by any order or decree, in the proceeding or otherwise interfere with (a) any of the political or governmental powers of the petitioner", and a similar provision in Section 83 (i). This Court, in impliedly holding in the *Bekins* case that the statute is applicable to a California irrigation district, necessarily did so upon the basis of the argument of counsel for the district, the Solicitor General, and Congressman Sumners, to the effect (1) that a California irrigation district did not partake sufficiently of the sovereignty of the state to prevent the application of the statute, and that its functions were proprietary and not governmental, or (2) that some of its functions were proprietary, so that the statute could have some application under the separability clause contained in Section 83 (i). (The California decisions on the subject at the time of the decision of this Court were somewhat conflicting.) Any other basis would be absolutely inconsistent with the express provisions of the statute and the above quoted portions of this Court's opinion.

Since the decision of this Court in the Bekins case, however, the highest Court in California, in several decisions, has definitely held that irrigation districts in California are "agencies of the state whose functions are considered exclusively governmental; that it owns no lands in a proprietary sense, its property being owned by the state and held only for governmental purposes". *El Camino Irrigation District v. El Camino Land Corporations,* 12 Cal. (2d) 378 at 382-3; *Anderson-Cottonwood Irrigation District v. Klukkert,* 13 Cal. (2d) 191.

The *Bekins* case was argued April 7, 1938, and was decided by this Court on April 25, 1938, and a rehearing was denied May 23, 1938. Neither of the California cases was decided prior to November, 1938. If these state decisions had been before this Court when it decided the *Bekins* case, this Court could not consistently have decided that Chapter IX of the Bankruptcy Act, as amended, applies to a California irrigation district. It is likewise clear, from the foregoing extracts from the opinion of this Court in the *Bekins* case, that said statute was carefully drawn so as not to apply to agencies of the state whose functions are exclusively governmental and whose property is state owned. Hence the effect of the foregoing extracts from the *Bekins* case is that the statute was not intended to apply to a California irrigation district. The decision of the lower Courts to the effect that the statute does apply is thus directly contrary to the foregoing extracts from the opinion of this Court in the *Bekins* case, and with

the expressed provisions of the statute. It also conflicts with said state decisions on a question of local law, to wit, the nature and character of a California irrigation district.

In any event, this Court should determine whether the statute can be applied at all to a state agency whose functions are exclusively governmental. The "interference" occasioned by applying such a statute is well illustrated by the interlocutory decree in this case which decreed "That the petitioner deposit * * * the sum necessary to pay the holders of its outstanding bonds * * *" (R. 193.) The statute involved is of nationwide importance. Public corporations all over the nation are increasingly seeking to avail themselves of the provisions of the statute. Other federal Courts, contrary to the decision of the Circuit Court of Appeals in this case, have adopted the view that the statute does not apply to a political subdivision of the state exercising governmental functions exclusively. *Supreme Forest Woodmen's Circle, et al. v. City of Belton, Texas* (C.C.A. 5, Dec. 16, 1938), 100 Fed. (2d) 655; *Luehrmann v. Drainage District No. 7* (C.C.A. 8, June 13, 1939), 104 Fed. (2d) 696; *Drainage District No. 7 of Poinsett County, Arkansas* (D.C., E. C. of Ark., Dec. 1927), 21 Fed. Supp. 798; *In re City of Lauderdale, Florida* (S.D. Fla., Apr. 21, 1938), 23 Fed. Supp. 229. In each of these cases it was held that the statute did apply because the petitioner was *not* a political subdivision of the state exercising governmental functions exclusively.

A basic purpose of the certiorari jurisdiction is to preserve uniformity of decisions in the federal Courts upon points of federal law.

2. The Municipal Bankruptcy Act has been applied in the instant case to an irrigation district whose functions, according to the decision of the highest Court of the state, are exclusively governmental. This involves an important question of constitutional law, to wit, whether the bankruptcy power of Congress extends to the states and their agencies exercising governmental functions exclusively.

It was decided by this Court in *Ashton v. Cameron County Water Improvement District,* 298 U.S. 513, that it did not, because it might destroy the sovereignty of the state essential to its proper functioning under the Federal Constitution. This Court also held in the *Ashton* case that if the consent of the state was essential, the state in giving its consent would be impairing the obligation of contracts and that the state could not, by consent or submission, enlarge the powers of Congress.

The decision of this Court in the *Bekins* case was also by a divided Court (the personnel of this Court having changed in the meantime), but this Court did not overrule the *Ashton* case. On the contrary, this Court attempted to distinguish present Chapter IX of the Bankruptcy Act from the earlier statute involved in the *Ashton* case, on the ground that the present statute was so drawn as to prohibit any interfer-

ence with the governmental affairs of the state of a political subdivision of the state, and hence, did not conflict with its decision in the *Ashton* case. Accordingly, the constitutional questions involved have not been determined, unless the decision of the Court in the *Ashton* case is controlling and decisive. If this be true, the decision of the lower Courts is directly in conflict with said decision of this Court.

Only by decision of this Court can these constitutional questions be definitely determined. They are of paramount public importance and their correct determination should not be left in doubt.

3. This Court should determine, we submit, whether the judgment dismissing the proceedings filed under the original Municipal Bankruptcy Act, which involved a controversy between the same parties and the same plan of composition, and was rendered after a hearing on the merits, is *res judicata* of all issues between the same parties in this proceeding, which involves the same plan of composition and arises under a statute which we submit is identical in substance with the statute involved in the *Ashton* case.

This question is also of general public importance because there are a number of other proceedings pending throughout the nation involving the same fundamental question. Two of these proceedings were decided by the Circuit Court of Appeals of the United States on the same day that it rendered its decision in

the instant case and a petition for writ of certiorari has been filed with this Court in one of these cases.

4. We respectfully urge that this Court also determine that when holders of bonds have entirely surrendered all of their interest in their bonds, and R.F.C. has no interest in them other than as security for a note in its favor, executed by a dummy trustee under a trust in which no beneficiary is named, that neither the consent to the plan of composition by the dummy trustee nor by R.F.C. can be counted in determining whether the required percentage of creditors to the plan of composition has been obtained.

5. This Court should determine, we submit, that when the same plan of composition has been adjudicated in a former proceeding under the first Municipal Bankruptcy Act wherein the petitioners here appealed to the Circuit Court of Appeals and obtained a reversal of the cause, but no other creditors did so that such other creditors and their successors in interest are bound by the plan of composition, so that there is no validity to the consent which they now purport to give in the present proceeding.

6. We submit this Court ought to determine whether the question of the good faith of the acceptance of Burns, a dummy trustee having no interest in the securities voted in favor of the plan of composition, where the alleged bankrupt has contributed substantially to the funds paid the former bondholders, is subject to the same general principles of equity which were applied in the case of *American United*

Mutual Life Ins. Co. v. City of Avon Park, ... U.S. ....., 61 S. Ct. 157, to private interests. Further that the same test as to whether such securities are either "owned" or "controlled" is to be applied regardless of the fact that the R.F.C., an agency of the United States, is involved.

7. While interest has been paid to the original consenting bondholders in a substantial sum and such interest was not provided by the plan of composition and the same is denied to the bondholders who did not accept the plan of composition, this Court should determine whether the payment of such interest constituted an unlawful preference and is discriminatory. We also contend that this Court ought to determine further that where interest is provided by the plan of composition and has been paid to consenting bondholders, but is denied to non-consenting bondholders, the plan is unfair and discriminatory.

8. We respectfully submit that this Court should settle the meaning of the requirement in the municipal bankruptcy provisions that the plan of composition shall be "fair, equitable and for the best interests of the creditors", and particularly whether these provisions import the same meaning and are to be gauged by the same standards as similar provisions contained in other sections of the Bankruptcy Act dealing with private corporations. This is a question of great public importance and which has not yet been determined.

The meaning of this portion of the Bankruptcy Act is of paramount public importance, because it relates to one of the essentials required before any plan of

composition under the statute may be confirmed. The question of whether a plan of composition is "fair, equitable and for the best interests of creditors" arises in every proceeding filed under the statute and until the meaning of this language is definitely determined by this Court, there will be a flood of litigation as to whether this requirement of the statute has been met.

Specifically this case involves the important question: Whether, where the admitted assets of a public corporation exceed its liabilities, a plan of composition, which seeks to reduce the principal of the obligation, is "fair, equitable and for the best interests of the creditors". We contend that, under such circumstances, the relief which can be granted should be limited to a reduction of the interest rate and to an extension of time of payment. In other words, the relief should not be greater than the necessity of the debtor requires.

9. This Court should also determine the proper construction of the provisions of Section 83 (b) of the Municipal Bankruptcy Act relating to the classification of the claims of creditors, and specifically, whether the word "pledged" was used in its common meaning or in the technical sense of a bailment; also, whether the expression "claims which are otherwise given preference as provided by law" refers to the law of the state or federal law or general law; and whether the principle *ejusdem generis* applies to this clause. The Circuit Court of Appeals has refused effect to decisions of the highest State Court construing Section 52 of the California Irrigation District Act as requiring that matured bonds

and matured coupons of an irrigation district be paid in the order of their presentation for payment, and giving to bondholders the correlative right to require such payment. The Court below has determined this question of local law contrary to the decisions of the highest Court of California. We contend that, since the record shows that petitioners' matured bonds and coupons are the only ones presented for payment, under said Section 52 and under said State Court decisions petitioners have a preferential right to payment which is ignored by the plan of composition, that the refusal of the lower Court to classify petitioners in their separate class is directly contrary to the federal statute. The proper construction of the provisions of Section 83 (b) of the new Municipal Bankruptcy Act is of general public importance, for the classification of creditors is involved in every proceeding under the statute, and the particular construction of the provisions of the statute involved in this case is of general importance and should not be left in doubt. If the construction of these provisions of the federal statute is not set at rest by decision of this Court, there will be needless and unnecessary litigation on the subject in the Federal Courts.

We submit that any one of the reasons hereinabove set forth is a sufficient ground for this Court granting a writ of certiorari under Rule 38, and certainly collectively the reasons above set forth are abundantly sufficient.

Wherefore, petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court in the case numbered and entitled in its dockets as "No. 9206, Milo W. Bekins and Reed J. Bekins, as trustees, appointed by the Will of Martin Bekins, Deceased, et al., Appellants, v. Lindsay-Strathmore Irrigation District, et al., Appellees", and that the decree of said Court be reversed by this Court with directions to dismiss the bill, and for such other relief as to this Court may seem proper.

Dated, Turlock, California,
January 6, 1941.

Milo W. Bekins and Reed J. Bekins, as trustees, appointed by the will of Martin Bekins, deceased,
Milo W. Bekins and Reed J. Bekins, as trustees, appointed by the will of Katherine Bekins, deceased,
James Irvine,
J. R. Mason,
James H. Jordan,
A. Heber Winder, as trustee of Eva A. Parrington Trust,
C. A. Moss,
H. E. Curtis.

W. COBURN COOK,
Counsel for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Martin Bekins, deceased; MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Katherine Bekins, deceased; JAMES IRVINE, J. R. MASON, JAMES H. JORDAN, A. HEBER WINDER, as trustee of Eva A. Parrington Trust; C. A. MOSS, and H. E. CURTIS, creditors of Lindsay-Strathmore Irrigation District,

Petitioners,

vs.

LINDSAY-STRATHMORE IRRIGATION DISTRICT, an insolvent taxing agency,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

Opinion of the trial court (R. 131), 25 Fed. Sup. 988.

Opinion of the Circuit Court of Appeals (R. 536, 547), 114 Fed. (2d) 680.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered September 5, 1940. (R. 595.) A petition for rehearing was filed October 4, 1940 (R. 597) and denied October 15, 1940. (R. 597.) The mandate was stayed until disposition of the case by this Court. (R. 597.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U.S.C. Paragraph 347(a)).

STATEMENT OF THE CASE.

A concise statement of the case is contained in the foregoing petition under the heading of Summary Statement of the Matter Involved, to which reference is made.

SPECIFICATION OF ASSIGNED ERRORS.

Statement of the points relied upon were filed in the Circuit Court of Appeals as required by the rules of that Court. These are set out at pages 488, 510, 527, et seq. of the record and they constitute the errors that were relied upon on the appeal. In the following brief, we, petitioners, set forth the assigned errors under each point which we urge in this Court.

I. THE COURT WAS WITHOUT JURISDICTION TO ENTER THE DECREE.

Chapter IX of the Bankruptcy Act does not apply to the Lindsay-Strathmore Irrigation District.

Assignment of Error No. 6 is as follows:

> "The Interlocutory Decree in this cause interferes with the political and governmental powers of the Lindsay-Strathmore Irrigation District and the property and revenues thereof necessarily essential for governmental purposes." (R. 489.)

Assignment of Error No. 7 is as follows:

> "By the provisions of Section 83 of the Bankruptcy Act the court is without power to apply its order to this irrigation district." (R. 489.)

Assignment of Error No. 14 is as follows:

> "The court erred in making and entering its Findings of Fact and Conclusions of Law herein, and in entering the Interlocutory Decree." (R. 490.)

Assignment of Error No. 1 is as follows:

> "Chapter IX of the Bankruptcy Act of the United States is unconstitutional and void and affects the property interests of the appellants in that it violates Article I, Section 10, Clause 1, of the Constitution of the United States and the Fifth, Tenth, and Fourteenth amendments to the Constitution of the United States." (R. 489.)

A. BY THE TERMS OF THE STATUTE THE COURT WAS WITHOUT JURISDICTION TO MAKE THE ORDER APPEALED FROM.

This is our first point on jurisdiction.

If the statute had been made to apply to public agencies generally, and contained a provision by Congress that the Act should not apply to irrigation districts, there would be no need for argument upon the point that the court would be wholly lacking in jurisdiction to make any judgment or decree which would apply to such an irrigation district. It is well settled that the jurisdiction of the court in bankruptcy matters is limited to that conferred by Act of Congress. (*Wheeling Structural Steel Co. v. Moss,* 62 Fed. 37, 39, and the cases cited therein.)

Under those circumstances, the irrigation district simply would not be authorized to avail itself of the Act. Or, put another way, the court would have no jurisdiction to make any order approving any composition by an irrigation district with its creditors. Yet, as to the political or governmental powers of the petitioner, the statute in effect stands exactly in that condition.

Section 83 (c) of the Bankruptcy Act, which is Section 403, Title 11, U. S. C., after stating that the Court may enjoin proceedings and put the plan temporarily into effect, provides:

> "* * * **But shall not, by any order or decree, in the proceedings or otherwise, interfere with (a) any of the political or governmental powers of the petitioner** * * *." (Emphasis ours.)

This provision is in the statute itself.

The Court below in the case of *West Coast Life Ins. Co. v. Merced Irrigation District,* 114 Fed. (2d) 654, 662:

> "The Court in the Bekins case did not premise its decision on the fact that the District involved was not a state agency, but rather that the Act as drawn did not usurp state powers. Let us quote again from the Bekins decision (p. 51) wherein the Court quotes the Committee on the Judiciary:
>
> " ' "The bill here recommended for passage **expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted.** The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. * * *" ' "
>
> "The Court then states:
>
> " 'We are of the opinion that the Committee's points are well taken and that Chapter X (§§ 81-84) is a valid enactment. **The statute is carefully drawn so as not to impinge upon the sovereignty of the State.** * * *' " (Emphasis ours.)

From the above quotation the Court below recognized that the Court in the *Bekins* case (Petitioners throughout will refer to the decision of the U. S. Supreme Court when the instant case was before that Court as the "Bekins case") did not premise its decision on the nature of the district, "but rather that the Act **as drawn** did not usurp state powers".

The above quoted provision from the statute is the one that expressly withholds jurisdiction to "usurp state powers".

This Court in the *Bekins* case quotes the Committee on the Judiciary as stating that

> "* * * The bill here recommended for passage **expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted** * * * no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill." (Emphasis ours.)

Then this Court concludes that the Committee's points are well taken, and states:

> **"The statute is carefully drawn so as not to impinge upon the sovereignty of the State."** (Emphasis ours.)

Again, the provision above quoted from the statute is the one clearly that "**expressly** avoids any restriction on the powers of the states or their arms of government". (Emphasis ours.)

The above quoted provision from the statute is clearly the one that provides:

> "No interference with the fiscal or governmental affairs of a political or governmental subdivision is permitted."

The above quoted provision of the statute is clearly also the one which makes the statute one "carefully

drawn so as not to impinge upon the sovereignty of the State".

This Court in the *Bekins* case held the statute constitutional because it "expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties".

Since Congress, by the portion of the statute above quoted, has by mandatory language provided that the court "shall not, by any order or decree, in the proceedings or otherwise, interfere with any of the political or governmental powers of the petitioner", the question is narrowed down to this: Are the powers of petitioner that are being interfered with by the order or decree appealed from "political or governmental"? If they are, then by the terms of the statute the court had no jurisdiction. It is only by determining that they are not political or governmental that the court can logically be held to have jurisdiction.

The suggestion on page 663 of the opinion of the Court below that that portion of the Supreme Court's opinion (p. 54) that Congress may, with the consent of the state, exercise the bankruptcy power over state agencies, and the further suggestion that the Supreme Court may have found procedural differences in the two acts to justify the conclusion that the later act did not impinge the sovereign rights of the state, in no way weakens our argument. No act of the state, affirmative or negative, and no consent of the state, and no procedural differences, can in any wise change the declaration of Congress in the later act now in

force that the court "shall not * * * interfere with any of the political or governmental powers of the petitioner". The consent of the state that its agencies may avail themselves of the provisions of the act is necessarily subject to this provision of the statute just quoted.

It will be recalled that the *Bekins* case was before the Court under the Act of August 24, 1937 (c. 754, 50 Stat. 751), which permitted a direct appeal from the District Court where the constitutionality of the federal statute is drawn into question.

At page 2 of the Brief of the United States in the *Bekins* case, it is stated:

> "QUESTION PRESENTED.
>
> "Whether the Act of August 16, 1937, is a valid exercise by Congress of its power 'to establish * * * uniform laws on the subject of bankruptcies throughout the United States.' "

The Court had before it simply the constitutionality of the Act, and the Court in reading the Act found that Congress had expressly denied jurisdiction to the court to make any order that would interfere with the political or governmental powers of the petitioner, and further than this the court was not required to go.

While the Court in the *Bekins* case did not find it necessary to pass upon the nature of the petitioner then before it, for reasons hereinabove suggested, it was argued at considerable length by the Solicitor General in his brief commencing at page 82 that the

irrigation district then before the Court was not strictly an agency exercising governmental or political powers. After pointing out that the district in the *Ashton* case was held to be a political subdivision, he states (p. 82):

> "* * * But in the case at bar the Lindsay-Strathmore Irrigation District is not a 'political subdivision' of the State of California, and Chapter X is carefully constructed to permit a separable operation."

He further states (p. 84):

> "* * * Thus, while the irrigation district exercises a narrowly restricted group of governmental powers, the California courts have repeatedly announced that it 'is not a political subdivision of the state or county, or a political subsidiary at all' * * *"

He further states (p. 85):

> "If the State of California, for its domestic purposes, itself refuses to give to the District all of the investiture of the sovereignty of the State, we submit that this Court should not invalidate an Act of Congress because of a supposed interference with the sovereignty of California * * *."

The Solicitor General then concludes his statement on that point (p. 86) in the following words:

> "It is, therefore, perfectly plain that Congress intended Chapter X to stand **so far as it covered any taxing agency to which it could constitutionally be applied.** It follows, since the Lindsay-Strathmore Irrigation District is not a political subdivision of the State, that the judgment must

> be reversed **whatever the validity of the Act as applied to taxing agencies which under local law share enough of the powers and immunities of the sovereign to be termed political subdivisions.**" (Emphasis supplied.)

In the *Bekins* case the irrigation district, appellant, at page 19 of their brief, makes similar argument as to its own nature. Among other things it says:

> "Any contention that it (an irrigation district of California) is inextricably connected with the sovereignty of the State of California finds no support in the decisions of the highest court of that state which would not result from the admitted impossibility (or undesirability) of formulating a rule by which the 'political', 'public' or 'governmental' activities or functions of an agency are to be distinguished from its 'private', 'corporate' or 'proprietary' activities or functions, in tort cases, eminent domain cases, execution upon property cases, and tax cases."

In passing, it should be noted that this Court in the *Bekins* case followed these arguments and in fact refers to California irrigation districts as merely "improvement districts" when it said "improvement districts, such as the petitioner, were in distress". (304 U.S. 53.)

We mention these arguments of counsel in the *Bekins* case to show that this Court had before it in the *Bekins* case only the broad constitutional question, and that counsel for appellants (both for the district and for the United States) recognized that the statute would be held to be unconstitutional unless

the governmental or political functions of the district could be taken out from under the control of the court under the statute, and thus the extended argument that California irrigation districts were not either political or governmental, or that, if political or governmental, yet to some extent they exercised proprietary or private functions so that the statute could be given some application to them, and would come within the saving clause in Section 401, Title 11, U. S. C.

The Supreme Court held the Act constitutional because the Act by its terms (as shown by the extract therefrom above quoted) especially and specifically and by mandatory language withholds jurisdiction from the Court to "interfere with any of the political or governmental powers of the petitioner".

Now at the time the *Bekins* case was decided there was no decision from any of the courts of California holding directly that **all** of the functions of an irrigation district were exclusively governmental, regardless of what may have been suggested or hinted at. Since the decision in the *Bekins* case, however, we have the several cases, commencing with *El Camino Irrigation District v. El Camino Land Corporation,* 12 Cal. (2d) 378, 383 (85 Pac. (2d) 123), where the Court said a California irrigation district is a district

> "* * * whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense, within the rule of defendant's cases * * *."

See also:

Moody v. Provident Irrigation District, 12 Cal. (2d) 389, 395 (85 Pac. (2d) 128);

Anderson-Cottonwood Irrigation District v. Klukkert, 13 Cal. (2d) 191, 197 (88 Pac. (2d) 685);

Peoples State Bank v. Imperial Irrigation District, 99 C. D. 317, 101 Pac. (2d) 466. (In this case the Court indicated that it had not intended to announce any new principle of law as to the status of a California irrigation district, but the fact remains that the California courts had not only failed, up to the time of the Bekins decision, to hold that the functions of a California irrigation district are exclusively governmental, but in some instances went pretty far in the opposite direction.)

It is respectfully submitted that, though the Act may be held to be entirely constitutional, this Court should not ignore the express mandate of the statute that the district court cannot "by any decree or order interfere with any of the political or governmental powers of petitioner", and it should not ignore the recent decisions of the highest court of California to the effect that all of the functions of petitioner are exclusively governmental. This is a matter of local law as to which the decisions of the highest court of the state are authoritative and conclusive in the federal courts.

Bank of Augusta v. Earle, 13 Peters 519, 10 L. ed. 274, 310;

Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178, 185;

Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 371-372, 37 L. ed. 772, 775;

Claibourne County v. Brooks, 111 U. S. 400, 28 L. ed. 470, 474;

W. T. Waggoner Estate v. Wichita County, 273 U. S. 113, 117, 71 L. ed. 566, 568;

Sutter Butte Canal Co. v. Railroad Commission, 279 U. S. 125, 139, 73 L. ed. 637, 641;

Memphis & C. R. Co. v. Pace, 282 U. S. 241, 244, 75 L. ed. 315, 319;

Bandini Petroleum Company v. Superior Court, 284 U. S. 8, 18.

Had the decree been permissive merely the objection would be equally good but the decree in this case actually commanded the district to deposit certain funds. The Court below surely erred in declaring in its opinion (114 Fed. (2d) 685) that this is not a matter of which the bondholders can complain.

For the very purpose of these proceedings by the petitioner for composition of its indebtedness under the statute is to interfere in the fiscal and other affairs of the district, and it cannot be successfully denied but that such is the effect of the order appealed from. Since all of the functions of petitioner are exclusively governmental, the conclusion is inescapable that the order appealed from interferes with the governmental powers of the petitioner. Yet the statute declares that the Court "shall not, by any order or decree, interfere with any of the political or governmental powers of the petitioner".

We respectfully submit that it logically follows that, by the terms of the statute, the Court was without jurisdiction to make the order appealed from.

We have dealt with this point at considerable length, as it is one that goes to the very foundation of the case. Since Congress has not given the court the power to deal with these functions, and has expressly prohibited it from so doing, it requires no argument to show that the Court is wholly lacking in jurisdiction.

In closing on this point may we suggest that to uphold jurisdiction is to determine that "ability to pay" must necessarily become the gauge of the power of taxation.

B. IN VIEW OF THE CALIFORNIA DECISIONS RENDERED SINCE THE BEKINS CASE, HOLDING THAT ALL OF THE FUNCTIONS OF AN IRRIGATION DISTRICT IN CALIFORNIA ARE EXCLUSIVELY GOVERNMENTAL, WHETHER THE STATUTE AS APPLIED TO SUCH A DISTRICT IS CONSTITUTIONAL IS STILL AN OPEN QUESTION. THE STATUTE AS SO APPLIED IS UNCONSTITUTIONAL.

Our second point as to lack of jurisdiction goes to the constitutionality of the Act as applied to one of these districts and is based upon the proposition that since all of the functions of an irrigation district in California are governmental and that point has been definitely settled and made clear beyond dispute since the decision in the *Bekins* case, the constitutional question as applied to such a district is still an open one.

Since it appears by both the Bekins and the Ashton decisions that the strictly governmental functions of

the petitioner are beyond the control of Congress, under the Bankruptcy power, the Act is actually unconstitutional as applied to one of these districts. The Act simply does not apply, and cannot be made to apply, to a California Irrigation district.

In the *Bekins* case the Court did not pass upon the nature of the petitioner. It was perhaps not even necessary. It was strongly argued, as we have also seen, that the petitioner was either not governmental at all or was only partly governmental. If at that time it had been settled by California decisions that all functions of such a district are governmental there can be little doubt but that this Court would have accepted that determination and held the Act void as to such districts. But it was not settled at that time. Since then, however, it has become thoroughly settled that irrigation districts "* * * are agencies of the state whose functions are considered exclusively governmental; their property is state owned, held only for governmental purposes; they own no land in the proprietary sense, within the rule of defendant's cases * * *." (*El Camino Irrigation District v. El Camino Land Corporation, supra.*)

The rule is well settled that in dealing with local law the United States Courts will follow the decisions of the highest Court of the state, and will change their position if necessary.

See:

Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289;

Chicago M. St. P. & P. R. Co. v. Risty, 276 U. S. 567, 72 L. ed. 703;

Green v. Lessees of Neal, 6 Pet. 291, 8 L. ed. 403, 405;

Fairfield v. Gallatin Co., 100 U. S. 47, 25 L. ed. 544, 546;

Wade v. Travis Co., 174 U. S. 499, 43 L. ed. 1060, 1064.

The Circuit Court of Appeals for the Eighth District in *Luehrmann v. Drainage District No. 7,* 104 Fed. (2d) 696, 698, after pointing out that the district involved in the *Ashton* case was held to be a political subdivision of the state, and that Drainage District No. 7 "is not a governmental agency", upheld the constitutionality of the new Municipal Bankruptcy Statute (Act of August 16, 1937, 50 Stat. 654, 11 U. S. C. §§401-404), and said:

> "This ruling is based upon the decisions of the Supreme Court of Arkansas holding that drainage districts are quasi-public corporations which are not political or civil divisions of the state like counties and municipal corporations created to aid in the general administration of the government. They are not created for political purposes, nor for the administration of the government. Appellants do not contend that the petitioner falls within the limitation upon the power springing from this amendment to the Bankruptcy Act, which limitation was declared in the Ashton case."

Since under the recent decisions of the Supreme Court of California (decided since the *Bekins* case) it is now settled that a California irrigation district is a state agency whose functions are exclusively govern-

mental, we respectfully submit that the statute, if applied to a California irrigation district, is unconstitutional, both under the *Ashton* case and under the *Bekins* case.

II. THE CAUSE IS RES JUDICATA.

Assignment of Error No. 4 is as follows:

"The cause is res judicata." (R. 489.)

Assignment of Error No. 48 is as follows:

> "The court erred in failing to find that the particular issue as to the validity of the powers referred to in said subdivision (e) and the right of the trial court to exercise said powers were involved and were necessarily involved in the trial of said prior proceeding, and said issue was determined in favor of the dissenting bondholders in this case." (R. 497.)

In 1935 the Lindsay-Strathmore Irrigation District filed a petition under the first Municipal Bankruptcy Act. This petition involves the same plan of composition as the instant proceedings. (R. 363.) The petitioners also appeared by answer and objections. The Court heard the case on the merits and made findings of fact and conclusions of law (R. 423) and entered a decree confirming the plan of composition. (R. 452.) These petitioners appealed to the Circuit Court of Appeals, which court reversed. (R. 468-9.) (*Bekins v. Lindsay-Strathmore Irr. Dist.*, 88 Fed. (2d) 1004.) The assignment of errors specified that the plan was unfair, inequitable, unlawful, the statute

unconstitutional and other grounds. The lower Court following the issuance of the mandate entered judgment, dated July 26, 1937, in favor of these petitioners which judgment became final. (R. 470.) Neither the Circuit Court of Appeals opinion nor the mandate (R. 469) specified the exact grounds of reversal.

It is therefore contended that this cause is *res judicata* on all points between these parties. The first Municipal Bankruptcy Act has not been repealed. Sections 78 through 84 constitute the present Municipal Bankruptcy Act. The second statute is merely an amendment of the first. It is all one law on the subject of municipal bankruptcy. Congress could have provided that a decree entered under Section 80 would not be a bar to a proceeding under Section 81, but did not do that. It merely provided that "the initiation of proceedings * * * under Section 80 shall not constitute a bar" to a proceeding under Section 81 (Section 83(h)).

So far as the form of the decree is concerned, either decree could equally have been entered under either one of these two enactments, Section 80 or Section 81. Both decrees are equally embraced within the power purportedly granted by Congress under each of these acts. Comparing the language of the two decrees (R. 452, 187) it will be seen that they are in substantial identity. In other words, the district here seeks to obtain, in effect, the same decree which it first obtained under the former proceeding. In logical effect it was adjudged in the first case that the decree in the second case could not be entered.

Where a rule of law becomes *res judicata,* the question in the second case only arises because the judgment would be different but for the former adjudication.

In the opinion in the case of *West Coast Life Insurance Co. v. Merced Irrigation District,* 114 Fed. (2d) 654, 661, the Court seems to hold that it does not appear from the Merced record, the grounds upon which the decree was reversed, saying:

> "There is nothing to indicate whether we relied upon the argument made at the hearing that the legislation was beyond the power of Congress, or upon the argument that consent of the State would constitute an impairment of the obligation of contract. In fact, it does not even appear that we based our decision on either of these arguments."

The Court goes on to say:

> "It cannot be said that the decision is res judicata as to either rule of law relied upon by appellants."

and seems to us to state that where a number of grounds are urged the decision "cannot be *res judicata* of all possible grounds for such order". There is no separate discussion of this matter in the opinion in the *Lindsay-Strathmore* case, and we look to the *Merced* case for the reasons for the confirmation of the Lindsay-Strathmore decree.

In the case of *Chicot County Drainage District v. Baxter State Bank,* 60 S. Ct. 317, 308 U. S. 371, this Court said:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end'. Grubb v. Public Utilities Commission, supra; Cromwell v. County of Sac., supra."

The former judgment, therefore is *res judicata,* not only that Congress does not have the power requisite to these proceedings, but that the plan is inequitable, unjust and unfair.

III. THE PLAN LACKS CONSENT.

Assignment of Error No. 17 is as follows:

> "The court erred in finding and holding that the Reconstruction Finance Corporation is a creditor affected by the plan." (R. 490.)

Assignment of Error No. 41 is as follows:

> "The court erred in not granting the motion of respondents to classify the Reconstruction Finance Corporation's claims separately and as claims not affected by the plan." (R. 495.)

Neither the R.F.C. nor Burns as trustee are creditors affected by the plan.

Section 81 of the Bankruptcy Act requires that not less than 51% of the securities **affected by the plan** (excluding any owned, held or controlled by the district) have accepted it in writing.

Petitioners made a motion in the trial Court to classify the creditors. (R. 109.) The Court gave notice (R. 110) to these parties.

The classification by the Court we contend was erroneous. Subdivision (a) of Section 83 provides:

> "No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, . . ., * * *".

In Section 82 it is provided that the term "security affected by the plan" means security as to which the rights of the holder are to be modified materially by the composition. This, of course, means adversely affected. We have already explained the mechanics of this transaction in the statement made in our accompanying petition. Even though Section 82 enacts that "Any agency of the United States holding securities acquired pursuant to contract with any petitioner under this chapter shall be deemed a creditor in the amount of the full face value thereof". We point out that these bonds were not acquired by the R.F.C. "under this Chapter", since the bonds, if acquired at all by the R.F.C., were acquired under the former Chapter IX. Nor are they "acquired", since they are merely held as collateral. Furthermore, the main block of the bonds are owned and held by W. J. Burns (R. 117) and they are not owned or held by the R.F.C. except as collateral and in consequence this

clause in Section 82 does not give any validity to the consent of the R.F.C. In fact this enactment in no way applies to such a situation as in this case. Finally we point out that so far as subdivision (j) of Sec. 83, is concerned, providing that consent to plans partially completed may be given by the holders of exchanged securities, it was enacted after the petition in this case was filed. The date of that enactment is June 28, 1938, and the date of the filing of this petition is September 21, 1937. It does not appear to be intended to vitalize a proceeding that was otherwise lifeless.

Ginsberg v. Lindel, 107 Fed. (2d) 721, 726.

Title 43, Section 403, U.S.C., under which the loan in this case was given by the R.F.C. provides that no loan shall be made until an agreement has been made between the district and its bondholders "under which a substantial reduction will be brought about in the amount of the outstanding indebtedness of the applicant". Therefore the R.F.C. had no authority to make a disbursal unless the reduction of indebtedness was immediately as opposed to ultimately effected.

As a matter of fact the R.F.C. agreement (R. 202) did not require that all of the debt should be liquidated, but only "the greater part". The clause in the R.F.C. resolution (R. 207) regarding the maintenance of "parity" of rights, which provides that the division chief of the R.F.C. may elect to keep the deposited securities alive to maintain a parity of rights shows upon examination that the intention was to maintain a parity of rights between the holders of the deposited securities and of the securities which were not deposited and in case it is necessary to keep them

alive then owners' agents are to be appointed. But no owners' agents were appointed. An entirely different procedure was set up by which the bonds were transferred to a man by the name of Burns, eliminating all rights of the former depositors.

Subdivision (b) of Section 5 of the R.F.C. resolution (R. 207) goes on to provide that in case the district pays interest on the note the corporation will accept such interest payments and give credit to the district for payment of interest of the deposited sesecurities. (Interest at 4% has been paid the R.F.C. since the disbursal of the loan on the amount disbursed (R. 573-574).) Therefore in this case there is no question but that the payment of 4% to the R.F.C. was a preference. And also there is no question but that this payment of 4% interest resulted in discrimination since we did not get any interest. Our interest coupons are still unpaid. Burns' coupons are liquidated.

Burns' deposition shows him to be a mere willing tool of the district, created to give color to its contention made in bad faith that the bonds are still alive. He testified that he was a "trustee of the Lindsay-Strathmore Irrigation District". (R. 393.) "The trust agreement represented his entire authority as trustee . . .". (R. 404.) "Mr. McBride[1] handled all the transactions for him". (R. 403.) Upon cross-examination by Mr. McBride Burns said he made a mistake if he said he was trustee for the district. For whom was Burns trustee? Trustee for Bad Faith. He did not dare comply with Section 83(a) requiring

1. The District 's counsel.

a statement by the trustee of his beneficiaries and his authority and his compensation. Petitioners' motion to strike the consents and the claims of Burns and the R.F.C. on this ground and the ground that neither are creditors adversely affected by the plan was denied. (R. 351.) This was error.

IV. THE PLAN WAS FULLY EXECUTED OUT OF COURT.

Assignment of Error No. 22 is as follows:

> "The court erred in finding that said plan was not prepared or substantially completed or executed several years before the commencement of this proceeding, and in finding that said plan is a plan of composition pursuant to said Chapter IX." (R. 491.)

Assignment of Error No. 30 is as follows:

> "The court erred in holding that sub-paragraph (j) of Section 83 of the Bankruptcy Act of the United States in any way applies to the consent of the Reconstruction Finance Corporation or to these proceedings." (R. 493.)

The R. F. C. has no authority to extend the time of the loan beyond a year. Title 15, Section 604(a) U.S.C. provides:

> "No funds shall be disbursed on any commitment or agreement to make a loan or advance hereafter made by the Reconstruction Finance Corporation after the expiration of one year from the date of such commitment or agreement; * * *."

This is further shown by the District's Exhibit 7 (R. 241), which is a resolution of the R.F.C. reciting the two previous loans have expired and granting a new loan and incidentally requiring that $100,000.00 be escrowed and held for the benefit of the R.F.C. (R. 241.) The apparent purpose of this requirement of the deposit of $100,000.00 was (it should be noted it is not in any way authorized by the vote of the people at the election for approval of the plan (R. 361)) a guarantee against the claims of the non-depositing bondholders.

The conduct of the parties shows that the transaction was complete and ended. The old loans expired. The R.F.C. demanded a cash deposit of $100,000.00. The district paid interest on the R.F.C. loan. (R. 573-4.) The R.F.C. reports to Congress that it made a loan to the district (not Burns). (R. 478.)

The petition in the former bankruptcy case (R. 411) recited (R. 415) that creditors of petitioner "owning not less than 30 per centum in amount of bonds, * * * have accepted said plan in writing, by the deposit of said bonds in escrow as hereinafter set forth,".

The findings in that case (R. 423, 443) determined that creditors holding more than two-thirds, namely, 85%, had accepted the plan in writing and that the writing had been filed in that proceeding. The findings and decree there indicated that the bondholders deposited their bonds and accepted the plan. Those bonds were made subject to the plan. The plan was fully executed as to those bonds which were sur-

rendered. On the other hand the decree was reversed as to the petitioners. They only are not bound by the plan. The plan has been fully executed and adjudicated as between the original bondholders and the district. *Chicot County Drainage District v. Baxter State Bank,* 308 U. S. 371.

V. THE PLAN OF COMPOSITION IS UNJUST, UNFAIR, INEQUITABLE AND DISCRIMINATORY.

Assignment of Error No. 8 is as follows:

> "The plan of composition herein is unfair, inequitable, and unjust and is not for the best interests of the creditors and it discriminates unfairly in favor of the Reconstruction Finance Corporation." (R. 489.)

Assignment of Error No. 66 is as follows:

> "The court erred in finding that the taking of title by the district to one-third of its lands had any substantial effect on the ability of the district to carry its bonded indebtedness since there is not and never has been any water available for the irrigation of the lands to which title was taken, and they never supported any substantial part of the bonded debt." (R. 501.)

PAYMENT OF INTEREST.

The district put in escrow $62,000.00 to pay interest at 4% from November 1, 1934 upon the refunding value of the bonds deposited. (R. 243.) This interest was paid up to the date of disbursal by the R.F.C. on April 26, 1937. Subsequently interest at 4% has been paid to the R.F.C. on the amounts borrowed. The plan of composition itself does not provide for interest

to depositing bondholders. The district stipulated "It was actually a contribution by the irrigation district to the depositing bondholders. The offer of interest originated from the district in order to induce deposit of the bonds * * *". (R. 261.) The Court below does not touch upon this question in the instant case but refers to it in the *Merced* case where the Court's position seems to be that because the interest paid to the depositing bondholders was not a part of the plan it is an outside matter and does not concern the Court. We contend that it is discriminatory and coercive. The fact it was outside the plan would appear to be sufficient lack of good faith to invalidate the plan under the decision in the *City of Avon Park* case (supra). Furthermore we point out that the 4% interest paid to the R.F.C. is available under the plan itself and that the money is provided by the plan and if denied to the petitioners it is only denied as a matter of coercion and there is no reason why the alleged bankrupt should benefit at the expense of the petitioners. These interest items amount to roughly $150.00 per bond. (4% on $600 from Nov. 1, 1934.)

Would it have been proper to pay a greater lump sum of money as a consideration to acceptors of the plan? Would not such a payment have been an unlawful preference? And how indeed can the district pay anything outside the plan? We have shown that the R.F.C. agreed that the 4% interest received would be accepted in lieu of the payment of the interest coupons on the deposited securities. (R. 208.) Therefore the payment of this interest to the R.F.C. and the denial of it to the petitioners is essentially discrim-

inatory and amounts to saying that the creditors who accept the plan will be paid this interest, but those who do not accept it will be denied interest. When it is considered that the petitioners successfully contested the first bankruptcy proceeding, the injustice of depriving them of interest during the period of this litigation is all the more apparent.

THE PRINCIPLE OF THE BOYD CASE.

The principle of the *Boyd* case *(Northern Pacific Ry. Co. v. Boyd,* 228 U. S. 482), if applied to this case would seem to require reversal. It is no answer to say that debtor is a public corporation and that its assets cannot be taken over by the Court. In *Newhouse v. Corcoran Irrigation District,* 114 Fed. (2d) 690, the Court below in a case decided the same day as the instant case said:

> "The bankruptcy of a public entity, however, is very different from that of a private person or concern."

saying further:

> "such assets and such property within the District cannot be disposed of as in the ordinary bankruptcy proceeding for the benefit of a debtor."

Yet in the case of *Fano v. Newport Heights Irrigation District,* 114 Fed. (2d) 563, also decided the same day the same Court said:

> "It is undoubtedly true that the District has not funds in hand to fully pay this due interest and in that sense is insolvent, but it is not only far from insolvent in the bankruptcy sense, but owns

> debt free, except for the interest mentioned, assets in value many times the indebtedness, all in most excellent physical and almost new condition."

Thus it appears that the Court below deemed that the words "fair and equitable" signify something which is fair and equitable in the **mind of the judge** but do not connote any definite standard or yardstick to be applied in these cases, and this solely because a public corporation is involved and its assets are not subject to seizure for the debts of the creditor.

It is the position of the petitioners that the same principles which apply to a private corporation in determining the question of fairness and equity apply with like force in the case of a public corporation.

As bearing, therefore, upon the question that the plan of composition here is not fair or equitable, we respectfully suggest the following considerations:

1. The assets of the bankrupt exceed its debts many times over. The total assessed value of the district (R. 343) is $1,648,700.34. This is for raw land without improvements. In addition the financial statement of October 31, 1935 shows capital assets in excess of the debts amounting to $731,544.60. The same condition is true as of October 30, 1938 (R. 347), except that by 1938 the capital assets have increased. See, also, R. 441, where the same Court in the first case made a special finding as to assets, which did not include land or private improvements, finding them to equal over two million dollars. The bond debt is $1,427,000.00 principal which with interest ag-

gregates $1,981,920.57. The district in its application for a loan to the R.F.C. represented that the assessed value of the land was $80.00. The percentage used by the assessor is 40%, which would mean an average of $200.00 per acre. This application by the district (R. 407) also states that the fair value of citrus lands is between $750.00 and $1000.00 per acre. This means that 8000 acres of the 14,000 are worth $6,000,000.00. The district itself estimated the value at $10,000,000.00. (R. 408.)

2. The District Securities Commission having jurisdiction over the affairs of the district made a finding (R. 231) (as is required by law) that the new refunding bonds do not exceed 60% of the aggregate value of the water, water rights, and other properties owned by the district and the reasonable value of the lands. In other words the plan of composition offers not to exceed 60% of the value of a portion of the bankrupt's assets.

3. This district has a bonded debt of $1,427,000.00, yet in the past ten years it expended one million dollars in litigation. (R. 382, 379.) The fact that this district was able to make such tremendous expenditures over and above meeting its bond obligations in full up to 1933 is impressive of the ability of the district to pay.

4. The fact that the bond issues were scheduled to mature over a short period of twenty years when the California law permits a period of fifty years was one of the vital factors affecting the default of the district. Under ordinary circumstances such a

bond issue would be refunded and the maturities extended over a further period of probably forty years without capital loss to the creditors. Why not such a plan now?

5. During the period that this district has been in default it has purchased capital assets in the amount of $300,000.00 (R. 382), and in addition has deposited a cash reserve of $100,000.00 (R. 383) with the R.F.C. and has substantial cash on hand, $121,-332.32. (R. 347.) If these amounts alone were applied to the indebtedness in addition to the composition offer, it would amount to an offer of 100 cents on the dollar of principal (excluding interest) instead of 60 cents.

6. The cost of production per acre is $154.89. (R. 308.) This includes $7.00 an acre for district taxes. (R. 322.) If the condition of the district is as bad as represented, $7.00 out of $154.00 cannot save the district, and it is unfair to take over 50% of the investment of the petitioners if it will only reduce a part of $7.00 expenses out of every $154.00. (This $154.00 includes $30.00 per acre for water toll. The district may lawfully levy water tolls or taxes. Therefore the water cost is really $37.00 per acre and of this only a part of $7.00 will be affected by the plan.)

7. The plan gives bonds to the R.F.C., but requires the petitioners to take cash.

8. Payment of 4% interest to the consenting creditors and denial of it to the objecting creditors was discrimination.

9. Petitioners have vested rights, *Provident Land Corporation v. Zumwalt,* 12 Cal. (2d) 365, 85 Pac. (2d) 116. These vested rights consist of (a) the money in the bond fund, (b) $100,000.00 deposited with the R.F.C., (c) $300,000.00 water stock, (d) tax sale certificates, (e) tax deeded lands, 5000 acres.

10. The Court below in its opinion in the *Fano* case, supra, in spite of the fact that the tax delinquency reached 30.3%, pointed out that over a period of years the delinquency, when credit is given for the collections actually made, amounted to less than 5% and the same line of reasoning in the instant case leads to the same conclusion. In the *Fano* case seven years of aggregate tax delinquencies amounted to 141.1%, whereas in the instant case (R. 331) tax delinquencies for the same period is the aggregate of 90.6% or some 50% less than in the *Fano* case. The average delinquency in the *Lindsay-Strathmore* case is less than 13%, whereas the statute anticipates a delinquency of 15%. In effect, the district collected $102.00 for every $100.00 in its budget during this period. Of course it did not levy sufficient to pay its debt in full, but it could have levied more and during the last three years the tax delinquency is less than 3%. In fact, an examination of the disbursements and receipts for the years 1921 to 1938 shows the total income for these years is $5,889,328.94, and expenditures $5,768,796.62. (R. 330.) The exhibits at R. 329 and 330 show that the difference between the income of the district for the period 1921 to 1938 is two and a half million dollars over

and above its **necessary operating expenses,** not taking into account one million dollars for litigation costs for that period. It is respectfully submitted that where the assets of a bankrupt exceed its liabilities, that the principal of an obligation should never be cut, but the payment of the debt should be amortized in the future so as to come within the income.

11. The District Court in its "Conclusions of the Court" (R. 131, 139), which were made part of the findings (R. 158), said:

> "the strongest evidence of the fairness and equity of the settlement is the indisputable fact that creditors representing more than 87 per cent. of the total amount of the outstanding indebtedness have voluntarily agreed to it * * *."

12. Both lower Courts commit error in stating that one-third of the land has gone to the district for tax delinquency. By 1933 the district had taken title to 4524 acres. (R. 331.) The district secretary said "The district does not have water for that land". (R. 386.) The basis of the Court's conclusions of fairness fall.

VI. THE PLAN OF COMPOSITION IS NOT PRESENTED OR ACCEPTED IN GOOD FAITH.

Assignment of Error No. 11 is as follows:

> "The offer of the plan and its acceptance are not in good faith." (R. 490.)

A want of good faith is shown in these proceedings by the following facts:

1. The failure of the district since 1933 to levy assessments under the provisions of Section 39 of the California Irrigation District Act.

2. Payment of interest to the depositing bondholders and to the R.F.C. and withholding similar advances from the non-depositing bondholders.

3. Assisting a creditor to "buy its way into Court", in that the district aided the R.F.C. at every turn to acquire its bonds which is denounced in *In re Hudson Coal Co.*, 22 Fed. Supp. 768 at 770.

4. By contributing to the cost of the so-called "purchase" of the depositing bonds $62,000.00 paid the bondholders. (R. 243.)

5. Because the district has relief under Section 11 of the California Statutes, and the Districts Securities Commission Act. (Appendix p. i.)

6. Burns and the R.F.C. declined to comply with Section 83(a) requiring the filing of a statement as to beneficiaries and compensation and he does not disclose for whom he is trustee.

7. The bonds come within that category of control which clearly indicates that the ownership of the bonds in any event is not in the hands of an investor who is adversely affected. The petitioners are all bondholders who have held their bonds for many years. They are not speculators. The holders of the consenting bonds paid sixty cents per dollar of their bonds and their consent is simply the product of the district's influence and reflect more the district's desire rather than an expression of an investor's inde-

pendent business judgment. *American United Mutual Life Insurance Co. v. City of Avon Park,* 61 S. Ct. 157, November 25, 1940.

VII. THE CREDITORS WERE NOT PROPERLY CLASSIFIED.

Assignment of Error No. 16 is as follows:

> "The Court erred in classifying the creditors, including the Reconstruction Finance Corporation, as one class". (R. 490.)

Assignment of Error No. 33 is as follows:

> "The Court erred in finding and holding that equity requires that any composition under the Bankruptcy Act, that all the bondholders should be considered as of equality and dealt with on a parity." (R. 494.)

We now come to one of the most important factual and legal questions involved in this case and one upon which neither of the Courts below made any comment in their respective opinions. From the opinions issued by the same Courts, however, in other cases it appears that the theory of the trial Court and the Circuit Court of Appeals is that the preference claimed by the petitioners is not a "preference as allowed by law" and that in any event that when bankruptcy intervenes these preferences cease to have place.

Section 83(b) provides that "the judge shall classify the creditors according to the nature of their respective claims and interests: Provided, however,

That the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources shall be of one class. The holders of claims for the payment of which specific property or revenues are pledged, or which are other wise given preference as provided by law, shall accordingly constitute a separate class or classes of creditors."

Subsection (e) provides that at the conclusion of the hearing the judge shall enter an interlocutory decree if satisfied that the plan

> "(1) * * * does not discriminate unfairly in favor of any creditor or class of creditors;"

Petitioners claim that under Section 52 of the California Irrigation District Act and the California decisions construing it, they have a preferential right to have their matured bonds and coupons which were the only matured bonds and coupons presented for payment paid in the order in which they were presented for payment, and consequently that petitioners are "holders of claims for the payment of which specific property or revenue are pledged", or that if this be not true, in any event they are the holders of claims "which are otherwise given preference as provided by law" within the meaning of Section 83(b) of the Bankruptcy Act, and that accordingly they "constitute a separate class or classes of creditors" within the meaning of the Bankruptcy Act.

THE FACTS.

The proofs of claim by Burns and by the R.F.C. do not claim interest nor interest coupons nor show any dates of presentation of any matured obligations to the treasurer (R. 40), but the proofs of claim of petitioners showed the dates of presentation of the matured obligations owned by petitioners. (R. 38, 75, 78, 72, 64, 80.)

$123,195.00 of the claims of petitioners matured and had been presented to the treasurer for payment and stamped by the treasurer as provided by Section 52 and established in the record. This record, therefore, presents the situation that the only matured claims that were ever presented to the treasurer are those of the petitioners, and if Section 52 gives a preference, it is a preference provided by law, and these claims should have been separately classified.

There is a second point of discrimination involved under this heading as shown by the following facts. Mr. Hubert, secretary of the district, testified that the district quit paying during the month of July, 1933. The Estate of Martin Bekins on November 7, 1933 presented seven matured bonds of $1000.00 each, which were due July 1, 1933, and they were not paid, and the Estate of Katherine Bekins on the same day presented about three coupons of $30.00 each due July 1, 1933, which were not paid. (R. 380.) The secretary of the district further testified that after the district quit paying, it continued to receive assessments from the 1932-33 levy which was made for the

payment of these particular bonds and coupons, and about $17,000.00 had been so received in the bond and interest fund, and at the time of the hearing there was approximately $15,000.00 in the bond principal fund, in addition to about $17,000.00 in the bond interest fund and most of this money was in these funds before these proceedings were filed. (R. 380.) It is contended, therefore, that these bonds and coupons of the two Bekins' estates should in any event be paid in full.

A total of $123,195.00 of bonds and coupons belonging to the petitioners matured from July 1, 1933 to January 1, 1938 (R. 38-60), and have been presented for payment and are secured by the bond funds on hand, and by other surplus funds and by other properties under the provisions of the California Irrigation District Act and must be paid in the order of presentation.

THE LAW.

Section 52 of the California Irrigation District Act provides (see Appendix p. vi):

> "Upon presentation of **any** matured bond of the district, the treasurer shall pay the same from the bond principal fund, and upon presentation of **any** matured interest coupon of any bond of the district, the treasurer **shall** pay the same from the bond interest fund. If money is not available in the fund designated for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of

> seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation." (Emphasis ours.)

Section 61(a) of the California Irrigation District Act makes provision for the payment of warrants for the payment of which funds are not available on presentation, and the pertinent portions thereof are printed in the Appendix. (See p. vii thereof.)

These provisions of the California Irrigation District Act have been construed by a long line of decisions as requiring that matured bonds or matured coupons shall be paid in the order in which they are presented for payment, and, if not paid on presentation, that they shall be stamped or registered, and shall bear interest at seven per cent per annum from date of registration and shall be paid in the order of registration as soon as funds are available.

The leading case on this subject is *Bates v. McHenry,* 123 Cal. App. 81, a case which involves the Merced Irrigation District. At the time of the presentation of interest coupons to the treasurer in that case there was not sufficient money in the bond fund to pay in full all matured coupons. It was contended that payment should be made in order of presentation as long as there is any money in the fund. The Court said:

"The portion of section 52 of the California Irrigation District Laws which we have quoted specifically provides that upon the presentation of any matured bond, or of any matured interest coupon, or any bond of the district, the treasurer shall pay the same from the bond interest fund. There is no provision in the section that payment shall be withheld until all of the matured bonds, or until all of the matured interest coupons have been presented. If there is any money in the fund available for payment, the section makes it the duty of the treasurer to pay the same."

The Court further said:

"Again, the treasurer of the district has authority to perform two acts: He must either pay the bond or interest coupon when presented, or register the same. The irrigation laws do not confer upon the treasurer of the district any authority to prorate payments. If the money is there and the bond or interest coupon is due, his legal duty is to pay. If money is not there, his legal duty is to register the bond and interest coupon and make payment, with the added interest, as soon as sufficient money is available."

The order of the Court was:

"that a writ of mandate issue in this cause, directed to the respondent, to forthwith proceed to make payment in full of any and all interest coupons, in the order in which they were presented for payment, until the entire fund in his hands, available for that purpose, is exhausted, and then to forthwith proceed to register any

and all interest coupons on which payment is not made, if so demanded by the holders thereof."

The next important decision was that of *Shouse v. Quinley,* 3 Cal. (2d) 357, involving the Waterford Irrigation District. In this case the Court held Section 52 (a) of the California Irrigation District Act unconstitutional. This section sought to authorize landowners to pay their taxes with matured bonds and coupons. The Supreme Court of California said in holding the Act unconstitutional:

"By the general terms of the act, the bondholder had the right to have his bonds paid upon presentation if money were available and if not to have them registered and paid in the order of presentation. (*Bates v. McHenry,* 123 Cal. App. 81 (10 Pac. (2d) 1038).)

"It thus becomes apparent that the result of the questioned section is first of all to abrogate the law with respect to the order of payment. So changed, it is as though the law read: Landowners who are the owners or who become such by purchase or otherwise of matured bonds or interest coupons shall be entitled to payment in preference to or without regard to bonds or coupons which have matured and which have been presented and registered previously for payment. * * * The two results mentioned very obviously demonstrate that the nonlandowning bondholder would suffer a very severe change of his contract were it to be held that the section does not impinge upon the constitutional provision against the impairment of the obligation of contracts. It requires no argument to establish that time and

method of payment are material and vital parts of the obligations of a contract.

"* * * The very statement of the argument refutes itself, because the bondholder next in order of presentation is entitled to be paid with the sums realized from the assessment for that purpose and not to be indefinitely postponed. * * *."

The third leading case is that of *Selby v. Oakdale Irrigation District,* 140 Cal. App. 171. The Oakdale Irrigation District was in default at the time and had a refunding plan and subsequently filed a bankruptcy petition. The district made an insufficient levy for its bonds. The suit was a mandamus proceeding to compel the payment of matured bonds and coupons in the order in which they had been presented for payment, notwithstanding that the moneys on hand in the bond funds were insufficient to pay all maturities.

In discussing the question of priority of payment, the Court said:

"Likewise, in the case of Rohwer v. Gibson, 126 Cal. App. 707, 14 P. (2d) 1051, this court held that there being no provision in the law relating to reclamation districts providing for the order in which interest coupons or bonds should be paid, the obligations should be marshaled and the moneys on hand apportioned. Here, again, there is a marked distinction between the reclamation laws and the Irrigation Act. Section 52 of the Irrigation Act, as we held in Bates v. McHenry, supra, provides for the order of payment, and, if not paid, for the registration of both bonds and

interest coupons, and that thereafter, payment shall be made in the order of registration."

The Court then proceeded to discuss the economic question and said:

"Though discussed by counsel, the fact that the bonded indebtedness of the district and the low price of farm products indicate that both bondholders and property owners are suffering, and probably will suffer excessive losses, we do not find that such facts should enter into or determine the rights of the respective bondholders as to what moneys there may be on hand for making payment of the legal obligations of the district."

In the case of *El Camino Irrigation District v. El Camino Land Corporation,* 12 Cal. (2d) 378, 85 Pac. (2d) 123, the Supreme Court of California in holding that the bondholder could not levy execution upon an irrigation district said:

"Moreover, to permit successful judgment creditors, whose bonds may not be prior in registration, to be paid by the proceeds of execution sales, would result in an unjustified preference in favor of those who brought the actions and procured the levies. The lower court in the instant case made an express finding to this effect, and the procedure, unless restricted in some manner unknown to us, would operate to violate the rule of priority established by the decisions in this state. Bates v. McHenry, 123 Cal. App. 81, 10 P. (2d) 1038; Selby v. Oakdale Irrigation District, 140 Cal. App. 171, 35 P. (2d) 125; Strasburger v. Van

Delinder, 17 Cal. App. (2d) 437, 62 P. (2d) 387; Shouse v. Quinley, 3 Cal. (2d) 357, 45 P. (2d) 701."

The District Court of Appeal in California (not the highest Court in the state) in *Clough v. Baber,* 100 Pac. (2d) 519, 101 C. A. D. 306, sought to distinguish these cases as to a district having but $15,000 of assets and bonds of $575,000 in the following language:

> "In none of those cases was the application of sections 52 and 61a of the act involved under circumstances like those of the present proceeding where the district is insolvent and the fund on hand is inadequate to pay more than a small percentage of the matured bonds and obligations of the district, and where all of the lands of the district have been sold and conveyed to the state for delinquent assessments, thereby exhausting all available means of levying future taxes to pay the bondholders. In those cases there was no showing of the injustice of directing the payment of registered bonds so as to deprive all other bondholders of the possibility of ever recovering any substantial portion of their investments therein."

The Court also said:

> "A construction of those cases should not obtain which will absolutely impair or destroy the obligations of the contracts to pay other bonds or coupons by distributing to those who have first registered their bonds all of the funds which the district will ever be able to raise."

However, in the case of *Provident Land Corporation v. Zumwalt,* 12 Cal. (2d) 365, 85 Pac. (2d) 116,

in a case involving a district in much the same circumstances where all the land had been taken by the district itself for non-payment of assessments, the Supreme Court of California, the highest Court in the state, held differently. In this case, the District issued $1,190,000 of bonds. In January, 1936, bonds in the amount of $152,000 and interest coupons in the amount of $225,000 were past due. From 1933 to 1936 the District acquired title to over 10,000 acres of land by tax deed. On January 6, 1936, the Board of Directors passed a resolution to purchase $50,000 of unmatured bonds using $10,000 of "general" fund moneys derived from rentals of tax deeded lands.

The plaintiff was the holder of $86,000 past due bonds and $125,000 of past due coupons which were of course prior in date of presentation and registration to the bonds so purchased and brought suit to set aside the sale and restore the money to the treasury.

The Court pointed out that the ordinary method of payment to bondholders had broken down; that farmers were unable to meet their obligations; that delinquencies mounted, which became increased by the pyramiding system; and that as a result some of these districts now own practically all of the land within their boundaries. The Court said:

> "It is further apparent that the district's method of buying outstanding unmatured bonds at a discount is in effect the giving of a preference to bondholders who are not legally prior in time to others."

The Supreme Court of California further said (pp. 373-374):

> "We do not understand how a debtor owing $360,000, long overdue, can have a surplus of $10,000. Nor do we understand how the district can be entitled to take all of the money derived from the land, whether by sale or lease, and use it for purposes other than payment of the primary obligations of holders of overdue bonds. It is within the discretion of the directors to use some portion of it for running expenses, and where this use is necessary, their discretion will be upheld on familiar principles. But when the directors themselves declare that a surplus exists, over and above the operating needs of the district, two things should be clear: first, that this money should go to the bondholders; and second, that in any event, it should not be given to junior bondholders in preference to those with prior claims, but should be paid on past due bonds and coupons in the order of their presentation." (12 Cal. (2d) 365, 373-374.)

We respectfully submit that the foregoing California decisions clearly establish that Section 52 of the California Irrigation District Act requires that matured bonds and matured coupons of an irrigation district be paid in the order of their presentation for payment, and that any such bond or coupon not so paid be stamped or registered, to be thereafter paid in the order of registration, and inhibits the disbursement of moneys on hand in the District's bond fund on a pro rata or any other basis. These decisions are binding upon this Court under the doctrine of *Erie*

Railroad Co. v. Thompkins, 304 U. S. 64. The Circuit Court of Appeals refused to follow them, thus creating a conflict of decisions, which this Court should correct.

Since this California statute provides that matured bonds and coupons of an irrigation district must be paid in the order of their date of presentation for payment, and confers upon bondholders the substantive correlative **right** to have their bonds so paid, we respectfully submit that the moneys on hand in the bond fund of the District are in effect "pledged" for the payment of the matured bonds and coupons of petitioners within the meaning of Section 83(b) of the Bankruptcy Act.

Likewise the surplus moneys over and above necessary operating expenses, such as the $100,000 deposited with the R.F.C. as security (R. 383) against the possibility of the petitioners being ultimately successful, and all other surplus funds (R. 347) and tax process property constitute trust funds securing the preference claimed. In *Provident Land Corporation v. Zumwalt,* 12 Cal. (2d) 365, 85 Pac. (2d) 116, the Court said:

> "In our opinion, the statute was intended to secure the bonds by the proceeds of the land in the district."

The Court also said:

> "but the lands remain in trust, and the district exercises its powers, however broad, as a trustee. Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust."

It is well settled that words used in a statute, including acts of Congress, are to be given their ordinary and common meaning, unless there is something in the statute itself clearly indicating otherwise.

Columbia Water Power Co. v. Columbia Electric Street R. L. & P. Co., 172 U. S. 475, 43 L. ed. 521;

Blair v. Chicago, 201 U. S. 400, 51 L. ed. 801;

Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442;

De Ganay v. Lederer, 250 U. S. 376, 63 L. ed. 1042;

Woolford Realty Co. v. Rose, 286 U. S. 319, 76 L. ed. 1128;

Avery v. Commissioner of Internal Revenue, 292 U. S. 210, 78 L. ed. 1216;

Old Colony T. Co. v. Commissioner of Internal Revenue, 301 U. S. 379, 81 L. ed. 1169;

United States v. Wurts, 303 U. S. 414, 82 L. ed. 932.

The term "pledged", given its ordinary and common meaning, signifies a solemn promise made which is not to be violated. In *Brook v. City of Philadelphia*, 162 Penn. 123, 29 Atl. 387, 390, this was held to be the meaning of the word in a constitutional provision directing that every city shall create a sinking fund which shall be inviolably pledged for the payment of the public debt. We therefore respectfully submit that the term "pledged" as used in Section 83 (b) of the Bankruptcy Act, was used in the same sense, and includes the claims of petitioner by reason of the fact

that Section 52 of the California Irrigation District Act in effect "pledged" the use of the moneys on hand in the bond fund of the District to the payment of matured bonds and coupons in the order of their date of presentation.

This Court in *City of Lincoln v. Luning,* 133 U. S. 529, 33 L. ed. 767, referring to a similar statute providing for the registry of overdue coupons and imposing upon the county treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto in their order of registration (Stats. of Nev. 1877, et), said:

> "This Act, providing for registration and for payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted;".

This construction of the statute is made doubly certain by the words "without preference" appearing in Section 83 (b).

This Court should not hold that the word "pledged" is used in a technical sense and as referring to a bailment to be maintained by delivery and possession of

specific property or revenues for the additional reason that the statute is dealing with municipal and other public corporations, very few of which are ever authorized to deliver specific property or funds as security for the payment of its obligations.

But even if it should be so held, certainly the claims of petitioners "are otherwise given preference as provided by law" within the meaning of Section 83 (b), and hence according to the express provision thereof "shall accordingly constitute a separate class or classes of creditors".

Any claim that the preferences and priorities which petitioners have under the state law are to be ignored, is answered by the following extract from *In re Consolidated Iron & Steel Mfg. Co.* (C. C. A. 6), 76 Fed. (2d) 837:

> "This does not signify that the law of Ohio can or does of its own force determine priorities under the National Bankruptcy Act. It means that the National Bankruptcy Act prescribes that effect shall be given to state laws which do give priority to certain debts. *In re Bennett,* 153 F. 673 (C. C. A. 6)."
>
> *Ginsberg v. Lindel,* 107 Fed. (2d) 721, 725, 726.

The contracts and claims of creditors of the District arose and are governed by state laws, and the reference in Section 83 (b) to claims "which are otherwise given preference as provided by law" obviously refers to the law of the state, for the same reason that this Court held in *United States v. Bekins,* 304 U. S. 27, that the provision in subdivision (e) of Section 83 of

the Bankruptcy Act, to the effect that it must appear that petitioner "is authorized by law to take all action necessary to be taken by it to carry out the plan",

"manifestly refers to the law of the state".

The petitioners were the only creditors having matured claims presented to and registered by the Treasurer. This situation did not exist in the Merced case where the lower Court discussed the point.

The obvious purpose of the statute in requiring that creditors be classified "according to the nature of their respective claims and interests" is that those who are entitled to be in a separate class be separately treated in the plan of composition in order to conform to the requirement of the statute (Sec. 83(e)) that the plan be "fair, equitable, and for the best interests of the creditors", and that it "does not discriminate unfairly in favor of any creditor or class of creditors;". Further, how are creditors who are in the position of petitioners to protect the preferences and priority which they have under the above California decisions construing Section 52 of the California Irrigation District Act, if they are not separately classified? They at least were entitled to be placed in one general class, separate and apart from other creditors not having similar preferences and priorities, so that it could be determined whether they as a class assented by the required majority to the plan of composition. Putting them into the same class with other creditors, merely put them at the mercy of the holders of a larger amount of bonds, with everything to gain and nothing

to lose by ignoring and disregarding the preferences and priorities of petitioners.

This branch of the case presents several important questions of wide public interest as to the proper construction of the provisions of Section 83 (b) of the Bankruptcy Act relating to the classification of creditors which should be determined by this Court; it also presents a case where the Circuit Court of Appeals has refused to follow the decisions of the highest Court of the state on a question of state law. This makes an additional reason why certiorari should be granted.

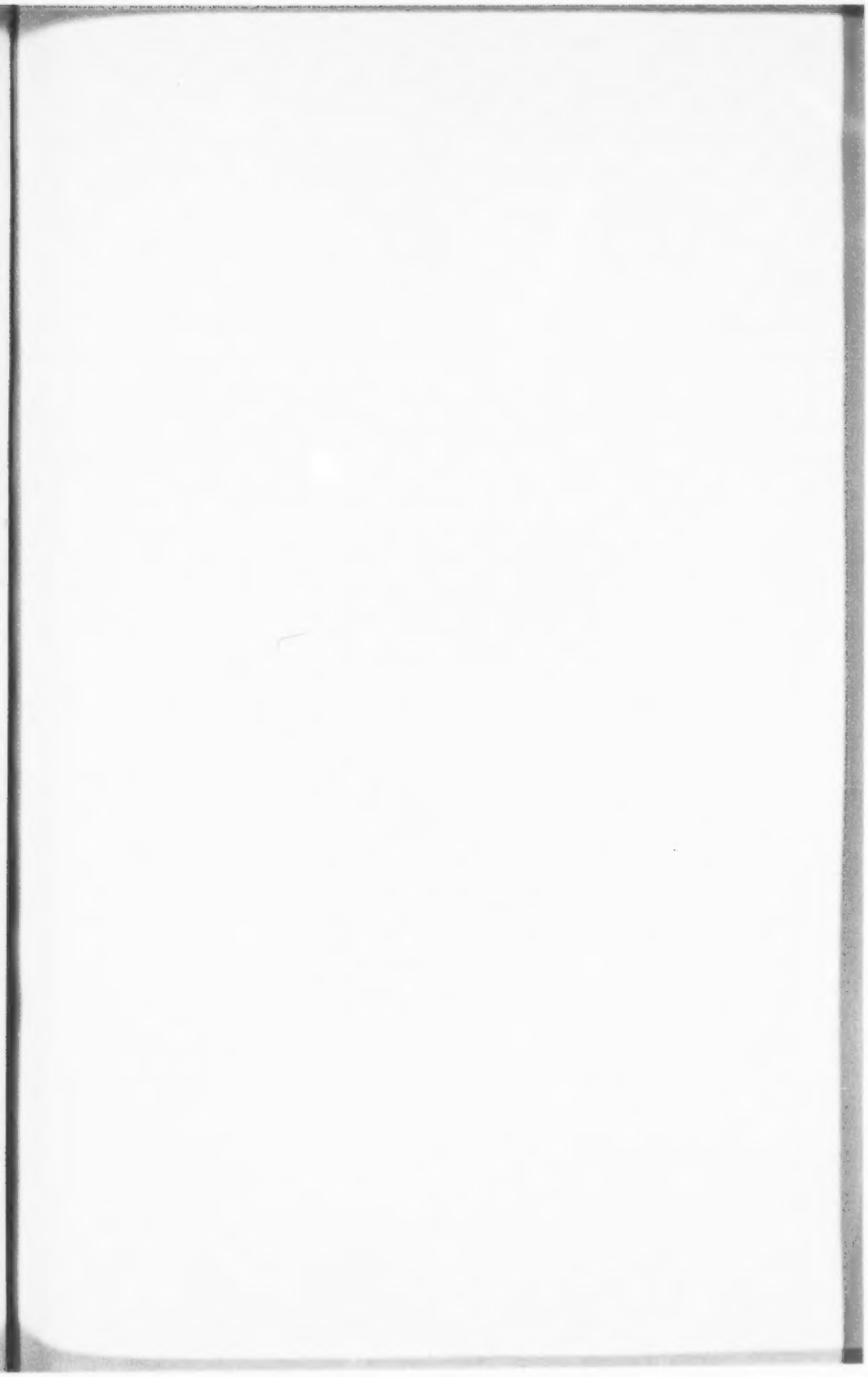
CONCLUSION.

It is submitted that the writ of certiorari should be granted, the decree of the Court below reversed and the proceeding directed to be dismissed.

Dated, Turlock, California,
January 6, 1941.

Respectfully submitted,
W. COBURN COOK,
Counsel for Petitioners.

(Appendix Follows.)



Appendix

CALIFORNIA DISTRICTS SECURITIES COMMISSION ACT, CAL. STATS. 1931, p. 2263, AMENDED.

* * * * * * *

"Sec. 11. Whenever any district has levied the annual assessment required by the California Irrigation District Act or any acts amendatory thereof or supplemental thereto and when the money derived from said assessment, together with any other revenue allocated to payment of bond interest and principal, is insufficient to meet the bond interest or principal when due and said district defaults on its bond principal or interest, or both to the extent of not less than twenty per cent (20%) of the amount due, said defaulting district shall be subject to this section and shall be under the control and direction of the commission to the extent herein provided. Thereafter it shall continue subject to this section and to such control and direction during the effective period of this section unless and until the amount raised by its annual assessment as hereinafter provided, together with other revenue derived from any source and allocated to bond service or other outstanding obligations, shall sooner be sufficient to meet and pay off all matured and uncanceled or unrefunded obligations of such district, bonded or otherwise, in which event it shall cease to be subject to this section and such control and direction shall terminate so long as said district does not again default as aforesaid. Upon receipt of written notice from any such district or any creditor thereof, the California Districts Securities Commission shall make such an investigation of the affairs

of the district at the expense of the district as it may deem proper and for which funds are available in order to inform itself as to the financial affairs of the district and its lands, and to enable it to carry out the provisions of this section intelligently.

"The board of directors of any such defaulting district, in levying the annual assessment of the district, may, notwithstanding Section 39 of the California Irrigation District Act or any other provision of law governing such district, levy only for such total amount as in their judgment by a finding of fact, approved by the Districts Securities Commission it will be reasonably possible for the lands in said district, taken as a whole to pay without exceeding a delinquency of fifteen per cent. In determining the amount it is possible for the lands to pay, at the time of each annual assessment, the board of directors shall consider the productivity of lands in the district, crops growing and to be grown during the year, market conditions as well as they can be forecast, the cost of producing and marketing crops, and obligations of the land respecting taxes and public liens. Out of the money derived from such annual assessment the board of directors of the district may set aside such sum as, in the judgment of said board, and approved by the commission, may be necessary, in addition to other revenue allocable to that purpose, for the operation and maintenance of said district and its works for the ensuing year. The balance of said money derived from such annual assessment shall be prorated to bond interest, bond principal and to other outstanding obligations of the district in the proportion that the total

amount due on each of said items shall bear to the said balance.

"This section shall remain in effect only until the first day of November, 1935, unless sooner repealed. The Legislature expressly declares that this section is intended to be applicable to all bonds, obligations and assessments of districts which have defaulted to the extent hereinbefore set forth, and the Legislature expressly declares that it applies to all bonds now or hereafter issued and outstanding, including bonds issued before this law was enacted. Nothing in this section contained, however, shall be deemed to extinguish or cancel any obligation due from any district, and whenever the annual assessment, levied as hereinbefore provided, leaves matured bond principal or interest, or other matured obligations, unpaid, said unpaid balance shall continue as a district obligation until paid or refunded in accordance with law. (Repealed and added, Stats. 1933, p. 355.)"

Note: This section has been reenacted each two years including Statutes 1939, p. 1241, but the changes are not material to the questions involved. The act was discussed in *In Re Imperial Irrigation District* at 10 Fed. Sup. 832.

CALIFORNIA IRRIGATION DISTRICT ACT, CAL. STATS. 1897, p. 254, AS AMENDED.

* * * * * * *

"Sec. 39. The board of directors shall then, within fifteen days after the close of its session as a board

of equalization, levy an assessment upon the lands within the district in an amount sufficient to raise the interest due or that will become due on all outstanding bonds of the district on the first day of the next ensuing January and the first day of the next ensuing July, or that the board of directors believes will become due on either or both of said dates, on bonds authorized but not sold; also sufficient to pay the principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year; also sufficient to pay in full all sums due or that will become due from the district before the close of the next ensuing calendar year on account of rentals, or charges for lands, water, water rights or other property acquired by said district under lease or contract; also sufficient to pay in full all sums due or that will become due from the district, before the close of the next ensuing calendar year on account of contracts entered into by the district for power or fuel used or to be used for the pumping of water for the irrigation of land within the district, provided, the payment of the cost of such power or fuel has not been provided for by the levying of tolls or charges for the use of water or otherwise; also sufficient to pay in full the amount of all unpaid warrants of the district issued in accordance with this act and the amount of any other contracts or obligations of the district which shall have been reduced to judgment; also such an amount as the board of directors may determine is necessary, to be set aside as a depreciation fund for the re-

placement or reconstruction of any specific unit or units of its works; also sufficient to raise such amount not exceeding two per centum of the aggregate value of the lands within the district according to the latest duly equalized assessment roll thereof, as the board of directors shall determine may be needed to be raised by assessment for any of the purposes of this act. The board of directors may also include in any annual assessment such an amount as it may deem proper, not exceeding one per centum of the total assessed value of the land in the district, to be apportioned to the bond fund and to be used as provided in section 52 of this act, for the redemption or purchase of bonds of the district not yet due, or for the creation of a sinking fund to pay any of such bonds as they become due; provided, however, that notwithstanding any provision of this act or any act amendatory hereof, or supplementary hereto, the board of directors may in lieu, either in whole or in part, of levying the annual assessment for the payment of interest on or principal of bonds, or for any other purposes of this act, use any income or revenue of the district derived from the sale of electric power or from the sale or lease of water or the use of water for power purposes.

Notwithstanding anything contained in this act, if any district shall have adopted a refunding plan as provided in section 32a hereof or shall have adopted any amendment thereof pursuant to the terms of this act, and such plan or modification shall provide for the raising of a fixed amount each year from assess-

ments to be applied to the payment of interest on or redemption of refunding bonds in the manner in such plan or modification thereof provided, the board of directors shall, in time, form and manner as herein provided, levy an assessment upon the lands in the district in an amount sufficient to raise the fixed amount required to be raised under such refunding plan or modification thereof in lieu of a separate assessment for interest due or to become due and in lieu of a separate assessment for principal or sinking fund due or to become due, and the amount of such assessment when collected shall be applied in the manner provided in such refunding plan or modification thereof. (Amended, Stats. 1939, p. 17.)"

* * * * * * *

"Sec. 52. Upon presentation of any matured bond of the district, the treasurer shall pay the same from the bond principal fund, and upon presentation of any matured interest coupon of any bond of the district, the treasurer shall pay the same from the bond interest fund; provided, however, that if any refunding plan adopted under the provisions of section 32a of this act, or any modification thereof adopted as in this act provided, shall designate a special fund for the payment of bond principal or interest or sinking fund, the same shall be payable out of such fund or funds designated in such refunding plan or modification thereof; and provided further, that to the extent any such fund contains money applicable to the sinking fund provided for in such refunding plan or modification, it shall be the duty of the treasurer of the district to withdraw such sinking fund moneys

from such fund to the amount and at the times required under the terms of such refunding plan or modification thereof and to apply the same as in such refunding plan or modification thereof provided. If money is not available in the fund designated for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation.

"Whenever there is in any fund of the district money in excess of that required for the purposes of such fund up to the time when any part of the next annual assessment levied in the district will become delinquent, the board of directors of the district may purchase with such surplus money, or any part thereof, any of its bonds not then due, and may cancel the bonds so purchased or hold the same as a part of its assets until such time as the board may determine that it is for the best interests of the district that such bonds or any of them be sold, or shall cancel the same at their date of maturity. (Amended, Stats. 1939, p. 17.)"

* * * * * * *

"Sec. 61a. Whenever any warrant of the district payable on demand is presented to the treasurer for payment when funds are not available for the payment thereof, it shall thereafter draw interest at a rate to be determined by resolution of the board of

directors, not, however, to exceed seven per centum per annum, until public notice is given that such funds are available. Upon the presentation of any such warrants for payment, other than warrants issued under the provisions of section 61 hereof, when funds of the district are not available to pay the same, the treasurer of the district shall endorse thereon the words 'funds not available for payment', with the date of presentation and shall specify the interest that such warrants shall thereafter bear and shall sign his name thereto. He shall keep a record showing the number and amount of each such warrant, the date of its issuance, the person in whose favor it was issued, and the date of its presentation for payment. Whenever there is sufficient money in the treasury to pay all such outstanding warrants or whenever the board of directors shall order that all such warrants presented for payment prior to a certain date, be made and there is sufficient money available for such payments, the treasurer shall give notice in some newspaper published in the district, or, if none is published therein, then in some newspaper published in the county in which the district or any portion thereof is situated, or, if none is published in such county, then the treasurer shall post such notice conspicuously in the place in which the board of directors of the district holds its regular meetings, stating that he is prepared to pay all warrants of the district for the payment of which funds were not available upon their original presentation, or all such warrants which were presented for payment prior to the date fixed by the board of direc-

tors, as the case may be, and no further description of the warrants entitled to payment shall be made in such notice. Upon the presentation of any warrant entitled to payment under the terms of such notice, the treasurer shall pay it, together with interest thereon at the rate specified by the board of directors, from the date of its original presentation for payment to the date of the first publication or posting of said notice, and all warrants for the payment of which funds are declared in said notice to be available shall cease to draw interest at the time of the first publication or posting of said notice. The treasurer shall enter in the record hereinbefore required to be kept, the dates of the payment of all such warrants, the names of the persons to whom payments are made and the amount paid to each person.

"No action or proceeding shall be maintained to enforce the payment of any such warrant or to require the levy of assessment therefor unless such action or proceeding be commenced within four years from the date of the original presentation of such warrant to the treasurer for payment; provided, however, that the board of directors is hereby authorized, subject to the consent of the California Districts Securities Commission to enter into agreement, either individually or collectively, with the holder or holders of any such warrant or warrants, fixing the time and method of, provision for and allocation of funds for the payment thereof and may by such agreement, waive, as therein set out, or otherwise waive, the time of commencing any action or proceeding thereon. (Amended, Stats. 1933, p. 1316.)"

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of January, 1941.*

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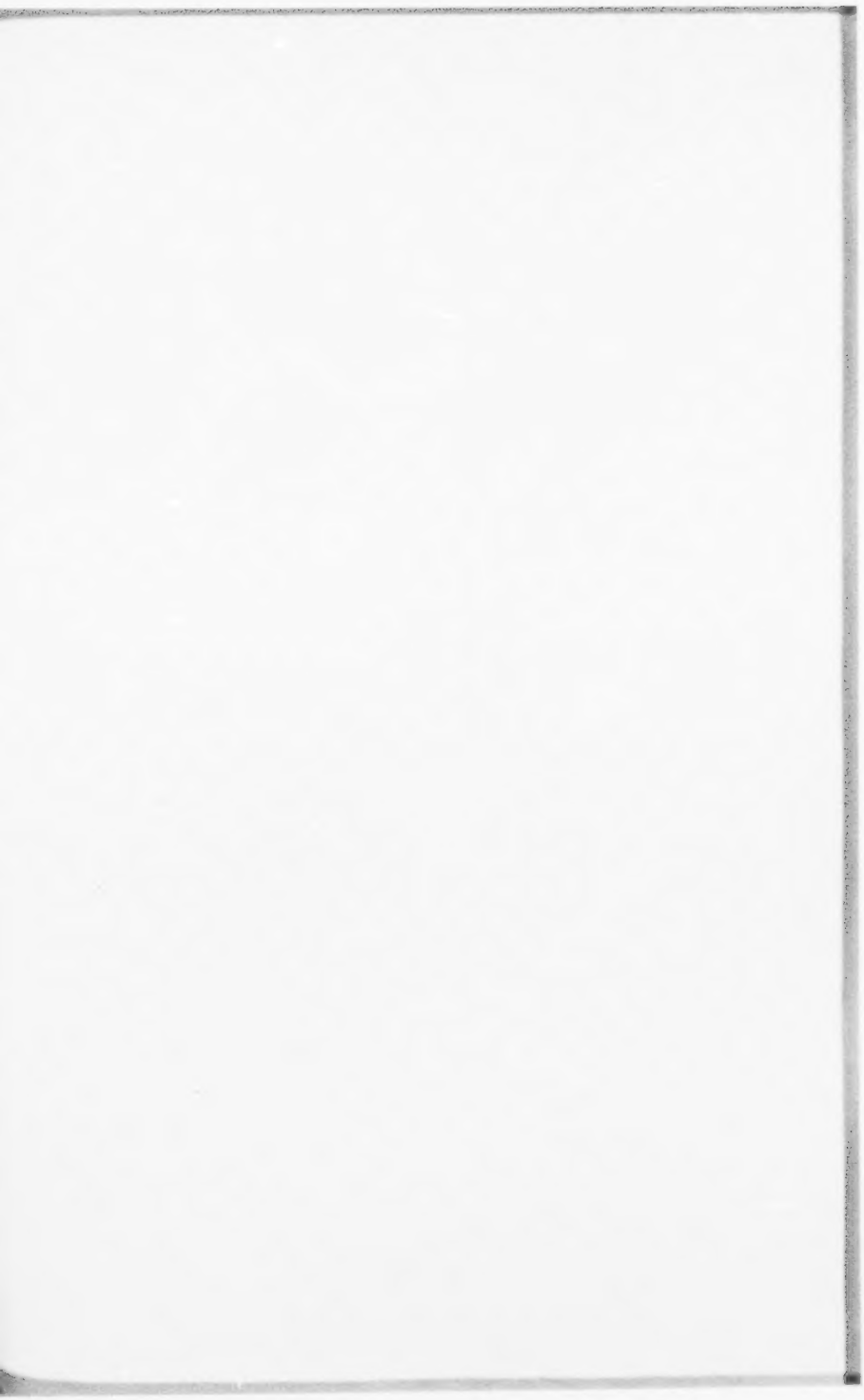
Counsel for Respondents.



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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 698

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Petitioners,

vs.

PALO VERDE IRRIGATION DISTRICT, an irrigation district,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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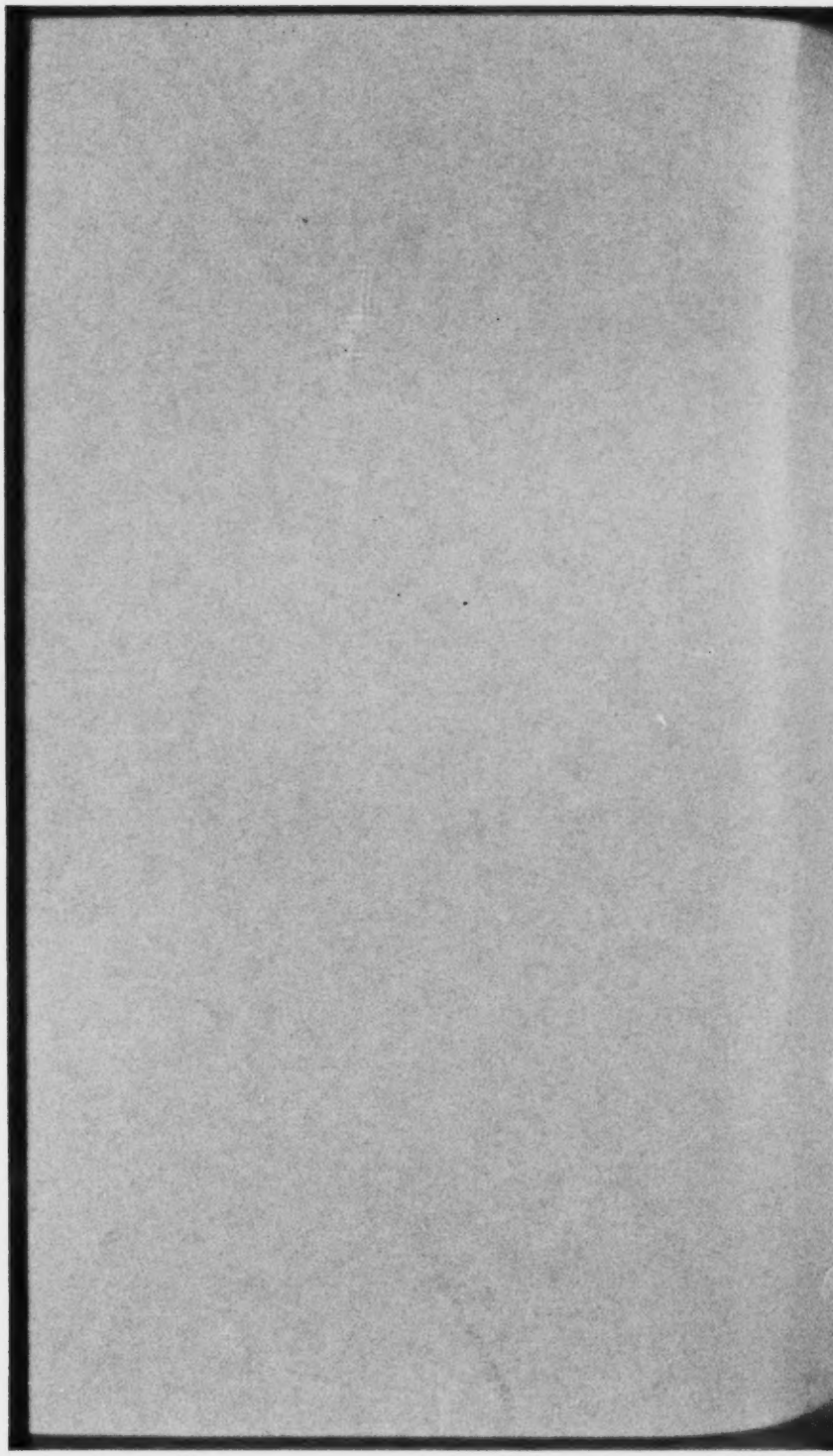

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In the Supreme Court
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OCTOBER TERM, 1940

No.

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),
Petitioners,

vs.

PALO VERDE IRRIGATION DISTRICT, an irrigation district,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision (R. 378) of the Circuit Court of

Appeals for the Ninth Circuit made in the above entitled cause on September 5, 1940, which affirms the decision of the District Court of the Southern District of California, Northern Division, rendered against petitioners on October 7, 1938. (R. 134.)

OPINIONS BELOW.

No opinion of the trial Court.

Opinion of the Circuit Court of Appeals (R. 379) 114 F. (2d) 691.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered September 5, 1940. (R. 378.) A petition for rehearing was filed October 4, 1940 (R. 437) and denied October 15, 1940. (R. 437.) The mandate was stayed until disposition of the case by this Court. (R. 437.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code. (28 U. S. C., paragraph 347(a).)

STATUTES INVOLVED.

Municipal Bankruptcy Act of May 24, 1934, Chapter 345 (48 Stat. 798) 11 U. S. C. 301-303, adding Sections 78-80 to the Bankruptcy Act of 1898; Act of August 16, 1937, Chapter 657 (50 Stat. 654) 11 U. S. C. 401-404, adding Sections 81-84; and Act of June 22, 1938, Chapter 575, Section 3(b). (52 Stat. 940.) Important

parts of California Statutes involved are set forth in the appendix.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding brought by the respondent, Palo Verde Irrigation District, a California irrigation district, organized under the provisions of a special act of the California Legislature, known as the "Palo Verde Irrigation District Act" (Cal. Stats. 1923, p. 1067), under what is now Chapter IX of the Bankruptcy Act of 1898 as amended. (11 U. S. C., 401-404.) The trial Court rendered an interlocutory decree confirming the plan and its decision was affirmed by the Court below.

Statement of facts.

About 1877 Samuel Blythe acquired about 40,000 acres along the Colorado River, which is now part of the Palo Verde Irrigation District. He obtained the first water right upon the Colorado River. In 1908 a private mutual water company was organized. In 1916 it executed a deed of trust conveying its irrigation system in trust to secure a certain bonded indebtedness of which $170,000 are involved in this proceeding.

The Palo Verde Drainage District is a public corporation organized under the provisions of California Statutes 1903, page 291, and it issued certain bonds amounting to $850,000 which are involved in these proceedings.

The Palo Verde Joint Levee District of Riverside and Imperial Counties, California, a public corporation, was organized June 17, 1914 under the provisions of California Statutes 1905, page 327. The district constructed and maintained a levee system along the Colorado River. It issued two issues of bonds. Of the first issue $911,951.86 principal and of the second issue $304,378.50 principal are involved in these proceedings.

The Palo Verde Irrigation District, hereinafter referred to as the "district", was organized in 1923 for the purpose of taking over the functions of the other two districts and the private company. It embraces 95,000 acres of land and is situated in the County of Riverside and overlaps an adjoining county.

Under Sections 12 and 13 of the Palo Verde Act (Appendix pp. ix, xiii) the district assumed the obligation of the bond issues of these other organizations. These sections declared that the drainage district and the levee district ceased to exist "except insofar as may be necessary to preserve the rights of bondholders and other creditors: * * *" The irrigation district itself issued certain bonds. First issue of bonds in the amount of $1,725,000 and the entire second issue amounting to $213,000 are involved in these proceedings. The total principal bond debt involved is $4,174,330.06. (R. 37.)

The petitioners own bonds of all three districts in the total amount of $79,000 principal. (R. 58, 59.) The bond issues all bear interest represented by coupons and the petitioners own the appurtenant

coupons as to their bonds and in addition own some coupons which are detached from other bonds. In 1933 the district applied to the Reconstruction Finance Corporation, hereinafter referred to as "R.F.C.", for a loan under Section 36 of the Emergency Farm Mortgage Act. (Title 43, Section 403 U. S. C.) The loan was granted. (R. 201.) The bondholders deposited their bonds "to or upon order" of the district. (R. 172.) The district ordered the surrender of the bonds and delivery to the R.F.C. (R. 179), and paid the expense of the escrow. These details are important in connection with our contention that the bonds are "controlled" by the alleged bankrupt district and so cannot be counted as votes for the plan of composition under the rule in *American United Life Insurance Co. v. City of Avon Park, Fla.*, 61 S. Ct. 157, ... U. S. ..... (Nov. 25, 1940). The R.F.C. loan was disbursed at 24.81 cents on the dollar principal and nothing for interest. This was all done as to over 90 per cent of the bonds before the first bankruptcy petition was filed in 1935. While the "plan" speaks of 24.81 cents, the private bondholders actually got fifty cents (R. 180, 181) which we claim was discrimination.

On March 29, 1935 the district filed a petition in the United States District Court for the Southern District of California, under Section 80 of the Bankruptcy Act of 1898. (Act of May 24, 1934, Chapter 345, 48 Stat. 798.) The petitioners here appeared in that case (See R. 295—the stipulation concerning these facts). The cause was tried on the merits

and submitted on December 8, 1936. The district judge entered a dismissal of the cause on the grounds of unconstitutionality. (R. 298.) Subsequently the district appealed to the Circuit Court of Appeals which appeal was dismissed. (88 Fed. (2d) 1016.) This is the basis of the claim we make of *res judicata.*

Thereafter certain of the petitioners in December, 1936 obtained an alternative writ of mandate in the Superior Court of Riverside County, California (R. 305) ordering payment of their matured bonds and coupons prior to any payment of any interest to the R.F.C. on its loan made in 1934. This writ is still outstanding.

Thereafter the district filed, in April, 1937, a petition under the Irrigation Districts Refinancing Act (Cal. Stats. 1937, Chap. 24) (part in App. p. i) seeking condemnation of petitioners' bonds under that statute. The statute provides for enforcement of composition plans by condemnation. The same plan of composition (R. 325) was presented to the Court That case was tried and resulted in a decision in favor of the district in April, 1938. On the same day the case of *U. S. v. Bekins,* 304 U. S. 27, 58 S. Ct. 811, was decided, holding the present Chapter IX constitutional. On May 13, 1938 the district filed its petition in bankruptcy in the United States District Court under the present Chapter IX, and subsequently moved to dismiss the condemnation proceedings in the State Court. The question of the dismissal of those proceedings is now on appeal in the State Supreme Court. (R. 149.) The prosecu-

tion of the appeal is enjoined in the District Court. The effect of the pendency of those proceedings is a point in issue here.

The plan of composition has been substantially the same in all three cases (set forth at R. 21) and provides for payment of 24.81 cents per dollar principal and nothing for interest.

The district had been in default upon payment of its indebtedness since 1927, and by 1932 had acquired title to 99.21 per cent of all the lands in the district (R. 258) and which it holds free of taxation by other state agencies. The land, assessed for $3,000,000 in 1937 (R. 25) is worth more than twice the amount offered the bondholders. (R. 295.)

Our view of the case.

Important and difficult questions are involved in these proceedings. While this district was not organized under the California Irrigation District Act it is of like nature to the one involved in the case of *U. S. v. Bekins.* The California Supreme Court has held that the functions of such districts are exclusively governmental and the petitioners seek consideration of the question whether Chapter IX now applies to districts such as this one.

As pointed out, the creation of this district imposed the liability of the former agencies upon the Palo Verde Irrigation District, and the question remains open whether Sections 12 and 13 of the Act (Appendix p. ix) do not have the effect of continu-

ing the liability of the former districts although the liability of the Palo Verde Irrigation District may be annulled in these proceedings. There is also the vital matter of the effect of ownership by this district of all of the lands within its boundaries.

Who in the social system is the beneficiary of such a bankruptcy plan where the district has taken title to all the land and holds it in trust not only for the performance of the public functions of the district, but also for the payment of the indebtedness? *Provident Land Corporation v. Zumwalt,* 12 Cal. (2d) 365, 85 Pac. (2d) 116. There are no beneficiaries to save. The landowners have disappeared. There is no social order to disrupt. Why should this land be cleared of debt for speculators at the expense of the creditors who have been for thirteen years without income from their investment?

This district goes to the R.F.C. and obtains a loan from the R.F.C. on the security of the lands of the district. The lands obviously had value over and above the loan. It may be best for the general welfare of the people of the state that landowners should not be dispossessed of their property en masse, yet here that has already occurred and new landowners have to be sought and obtained. Perhaps many of these are mere land speculators. Why then should this property be turned back to the district to be disposed of by the district and perhaps given away? Why should it not be held in trust for the bondholders so that all proceeds from future sales

should go to the bondholders? Why not a composition plan which would give the bondholders not only the proceeds of the loan, but also the land subject to the loan?

There is another aspect of the situation and that is that the state, having authorized issuance of these bonds, is really the debtor. These bonds bear the great seal of the state. They are state obligations, payable out of assessments against a certain geographical area. The state is the debtor. Now the state steps in and acquires title to the property. Therefore is this situation not really one where the state itself is the bankrupt? How can the state thus relieve itself of debt through bankruptcy?

The district judge, after hearing the first case on the merits, entered a decree dismissing the cause. It would therefore seem to be an adjudication not only on the question of constitutionality as applied to these bonds, but also on the question of fairness or any other issue that was or could have been raised in the case. This Court has held under the former Section 80 which was declared unconstitutional in the case of *Ashton v. Cameron County Water Improvement District No. 1,* 298 U. S. 513, 56 S. Ct. 892, that where bondholders fail to raise their defense, the judgment rendered is binding upon them in spite of the holding of unconstitutionality in the *Ashton* case.

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371.

The Court below held that certain points on appeal "were not urged in the trial Court". (114 Fed. (2d) 694.) This is assigned as error.

This case had been tried under the former Chapter IX before the same trial judge. A second hearing was had in the State Superior Court under Cal. Stat. 1937, Chapter 24, and it was stipulated that the transcript in the Superior Court be filed in the District Court in lieu of re-examining the witnesses. This stipulation said "That a transcript containing all oral evidence introduced, all objections and rulings thereon and all stipulations made at the trial held in the Supreme Court * * * may be offered in evidence * * * subject to all proper exceptions and objections other than that the witnesses were not produced in Court nor sooner nor testified orally." (R. 46, 47.)

In view of Judge Cosgrave's familiarity with the facts, the petitioners (respondents in the District Court) only presented three preliminary questions to the Court, the question of *res judicata,* the question of the action pending in the State Court, and the question whether the plan was executed out of Court. Obviously these were the only three questions which had not been considered at the first trial under Section 80 or at the trial in the Superior Court. The record went in subject to all of the pleadings (R. 147) and the objections that have been made in the State Court. The record will show, as detailed in our brief that all assigned errors were properly presented to the trial Court. Therefore in view of the fact that the

statute makes the requirement of the Court that it determine fairness of the composition plan, as well as determining other matters as provided in Section 83(e) of the Bankruptcy Act, and relying upon the rule that the Court must form its own independent judgment, petitioners will contend that the Court below erred in its opinion, stating some of the errors assigned had been urged upon the trial Court.

Petitioners will discuss in some further detail in the annexed brief certain other facts pertaining to this case.

Pertinent sections of the California statutes are set out in the Appendix.

QUESTIONS PRESENTED.

(1) We contend that the Palo Verde Irrigation District is a legislative mandatory of the State of California and that no decree of any character issued by a bankruptcy Court can be binding upon it, and that the decree here, although based upon the statute, interferes with the sovereign powers of the State, e. g., power of taxation, and that is true although this Court has held Chapter IX constitutional.

(2) Where an action is pending under a state insolvency law for condemnation of these bonds, if the statute is constitutional, is not such bankruptcy jurisdiction ousted, especially where the state law says that the State Court shall have exclusive jurisdiction of the matters involved? Furthermore, where this statute provides that the filing of an acceptance of the plan of readjustment in the State Court shall be binding upon the accepting creditors

and the district, regardless of subsequent dismissal of the proceedings, does not that constitute a contract which is binding in the Federal Bankruptcy Court?

(3) We contend that when a composition plan has been submitted to the Court after a full hearing and the Court has adjudged that that plan cannot be imposed upon objecting bondholders, that the cause is *res judicata* and the same Court cannot in a subsequent proceeding adjudge the plan to be binding upon the same objecting bondholders.

(4) Where the district itself contributed to the purchase price of the bonds taken over by the R.F.C. and the former bondholders have surrendered all of their interest in the bonds, and accepted the plan of composition, and the R.F.C. is to receive by the composition plan dollar for dollar which is paid for the bonds, can the consent of the R.F.C. be counted as representing an interest adversely affected by the plan? As not "controlled" by the district?

(5) We contend when creditors have accepted a plan of composition under a state statute which declares that such acceptance is binding, the plan has been executed out of Court as to such creditors.

(6) We contend that where some bonds are secured by the power of taxation on personal property as well as real property they are in a different class from the bonds taxable solely against real property. We contend that a writ of mandate impounding funds for certain creditors creates a right to separate classification.

(7) Where the plan on its face purports to allow 24.81 cents on the dollar of principal for each bond-

holder, but in point of fact holders of $170,000 have been paid fifty cents on the dollar, is not the plan discriminatory where as here the bonds paid at 50¢ have no priority over the other bonds?

(8) We contend that the rule of the Boyd case (*Northern Pacific Ry. Co. v. Boyd,* 228 U. S. 482, 33 S. Ct. 554) should be applied in municipal bankruptcy proceedings and this Court should so determine and that as applied here the cause should be reversed because the trust assets are greatly in excess of the debts.

(9) Where the public corporation has taken title to over 99 per cent of the lands in the district is a plan of composition fair which does not give these lands to the creditors in addition to the amount borrowed on them from a banker? We contend that there is no social or political reason justifying the taking of the land from the bondholders and giving it to speculators or even bona fide settlers, but that it should be conveyed to the bondholders in addition to giving the bondholders the benefit of the loan from the R.F.C. Furthermore, we contend that where the state has acquired through its agencies the title to all this property that to extend bankruptcy to such an agency amounts to extending bankruptcy to the state itself since the property is state owned and the agency a mere alter ego of the state. We contend further that all of such property is held in trust for the bondholders and the substantial amount of funds on hand and the lands of the district and all other trust properties are property which cannot be administered by a Bankruptcy Court, and that

the state cannot confer upon the Bankruptcy Court power to administer these trusts.

(10) The plan of composition is not proposed or accepted in good faith where the debtor has control of the securities affected, where it has contributed to the purchase thereof by the R.F.C., where it has connived at the execution of a contract not authorized by the electors, and where the R.F.C. is virtually its fiscal agent.

(11) Where the public agency was organized for the purpose of taking over the obligations of a private corporation and two public agencies, and those two public agencies were continued in existence "to preserve the rights of bondholders" does a composition proceeding to which only the public corporation which took over the liabilities of the others, is a party, discharge the debts of these other corporations?

(12) We contend that under the facts of this case stated above where the objections and points were pleaded, the case was tried upon the theory of the objections that were made, and the statute requires the Court to determine the very questions which we have raised, that a creditor can appeal and rely upon such objections and that this Court should so determine.

REASONS FOR GRANTING THE WRIT.

1. We submit that no judgment of the bankruptcy Court can extend to this district since its functions are exclusively governmental. This Court should determine that inasmuch as the statute declares that there

shall be no interference by decree or otherwise with governmental powers, that no decree of the bankruptcy Court can be binding upon this district nor could interfere with the right of the landowner or a creditor to mandamus the district to perform the duties imposed upon it by law with respect to taxation or other fiscal or governmental functions. This Court also should determine whether the provisions of the act, prohibiting interference with governmental powers does not void the decree here which in effect adjudicates that the district shall not pay its creditors in full, nor levy taxes, except in accordance with the plan, shall not issue further bond issues, shall not make any levy of tax without consulting the R.F.C., shall report to that agency and otherwise come under its control. We submit that the ability of a tract of land to pay taxes can not be adjudged by the bankruptcy Court to be the measure of the power of the state to levy taxes.

2. We submit that this Court should determine that this cause is *res judicata* by reason of the former adjudication of the same plan under the first municipal bankruptcy act, and that this question is of public importance and is undetermined and should be set at rest since the question may reoccur.

3. This Court ought to determine, we respectfully submit, that the R.F.C. cannot have its vote for the plan of composition counted where the district has contributed, however slightly to the purchase of the bonds, where the original bondholders have surrendered all of their interest in those bonds, and the R.F.C. is to receive dollar for dollar paid out in the purchase of the bonds. Such interest is not adversely

affected. This is a question of general public importance since the R.F.C. has advanced loans to many agencies throughout the nation.

4. We submit that where an action is pending under state insolvency law, which has not been declared unconstitutional, for condemnation of the bonds and where the statute provides that the local Court shall have exclusive jurisdiction, that the federal Court cannot take jurisdiction of such a cause; and furthermore we submit that the Court should determine that where the statute provides that giving of consent under the state law is binding upon the accepting creditors and the district, that becomes a contract which cannot be annulled under a bankruptcy proceeding. This is a question not previously determined by this Court.

5. We submit this Court should determine that regardless of whether the district involved has matured obligations which it cannot presently pay, a plan cannot be fair which seeks to pay less than the amount of the principal where the assets exceed the debts. Further this Court ought to determine that where there are no remaining landowners, i. e., stockholders or equity holders, the creditors should get all the assets.

6. Where a plan of composition offers 24.81¢ per dollar of principal to all creditors and the Court finds they are all of the same class, but $170,000 of claims were actually paid 50¢ on the dollar this Court should declare such a plan discriminatory as we contend.

7. The Court should determine, we submit, that a plan of composition is not accepted in good faith

where the securities are virtually "controlled" by the debtor, which has contributed to the purchase thereof, and that the same principles of law which apply to the relations between private citizens should be applied between the R.F.C. and the public debtor.

8. This Court ought to determine that where a public trust has been created the bankruptcy Court cannot administer that trust or make any decree concerning its administration.

9. This Court should determine, we submit, that where creditors in the bankruptcy proceeding have appeared, filed pleadings and made their objections known to the Court, and where, furthermore, the statute requires findings upon special and distinct issues, it is proper for such objecting creditors in an appeal to assign disallowance of those objections as error.

These matters are of great importance as affecting the proper administration of the Municipal Bankruptcy Law. The lower Courts, we feel, have been prone to confirm any plan of composition presented by a public agency, without as in this case, applying the rules of law which would be applied in the case of a private debtor. There is no special sanctity in the arrangements of public corporations. Public officials often display a far greater disregard of the principles of common honesty in conducting public business than they would in conducting their own private business. This Court should, we respectfully submit, lay down the rules which should prevail in the administration of this new field of bankruptcy law.

Wherefore, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court in the case numbered and entitled in its dockets as "No. 9133, James H. Jordan, J. R. Mason, L. F. Abadie, George F. Covell, and First National Bank of Tustin, a corporation, Appellants, v. Palo Verde Irrigation District, an irrigation District, Appellee", and that the decree of said Court be reversed by this Court with directions to dismiss the proceeding, and for such other relief as to this Court may seem proper.

Dated, Turlock, California,
January 6, 1941.

James H. Jordan,
J. R. Mason,
L. F. Abadie,
George F. Covell,
First National Bank of Tustin
(a corporation),

Petitioners.

W. COBURN COOK,
Counsel for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),
Petitioners,

vs.

PALO VERDE IRRIGATION DISTRICT, an irrigation district,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

A concise statement of the case is contained in the foregoing petition under the heading of Summary Statement of the Matter Involved. Other facts are stated below. (pp. 27-35, 37-39.)

I. THE COURT WAS WITHOUT JURISDICTION TO ENTER THE DECREE.

It is respectfully suggested that the trial Court was wholly lacking in jurisdiction. The petitioner being exclusively governmental in nature seems to be entirely excluded by the terms of the act under which these proceedings were prosecuted.

In Section 83(c) of the Bankruptcy Act, which is Section 403, Title 11, U. S. C., after stating that the Court may enjoin proceedings and put the plan temporarily into effect, it is provided:

> "* * * but shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the petitioner; * * *"

To make doubly sure that the political or governmental affairs of the State were not to be interfered with, Congress inserted in the Act subdivision (i) of the same section (83) which reads as follows:

> "(i) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor."

Then further, to guard against the Act failing entirely because some petitioner might be a governmental agent Congress inserted:

> "* * * That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance,

> is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding." (Tit. 11, Sec. 401, U. S. C.)

In the case of *Luehrmann v. Drainage District No. 7*, 104 Fed. (2d) 696, the Circuit Court of Appeals seems to incline to our view that in *U. S. v. Bekins* the Court did not intend to hold the act to apply to an agency exclusively governmental. The Court there points out that the drainage district "is not a governmental agency" and the Court further points out the separability clause in the municipal bankruptcy act.

The decree in this case will limit the power of the district to levy taxes, will subject the district to all the terms of the R.F.C. Resolution, e. g., the district will not issue further bonds (R. 201, 213), will operate on cash basis (R. 213), will give R.F.C. notice of meetings (R. 215), submit annual reports (R. 216), exclude lands from the district. (R. 219.)

The decree in this case in effect says that the power of taxation is limited by the "ability" to pay of the taxpayer.

Furthermore, Section 10, Subd. 5 of the Palo Verde Irrigation District Act (Cal. Stats. 1923, Chapter 452) (see appendix p. viii) declares that property acquired by the district is vested

> "in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this act."

In the case of *Anderson-Cottonwood Irrigation District v. Klukkert as assessor,* 13 Cal. (2d) 191, 88 Pac. (2d) 685, the district had taken over a considerable quantity of land through its assessment proceedings and the county assessed those lands for county tax purposes. The Court reviewed the authorities at some length and said:

> "Irrespective of that which hereinbefore has been stated with respect to the rule that under a constitutional provision exempting state-owned property from taxation it is immaterial whether the property is held in a proprietary or a governmental capacity, it does not appear that the lands here involved are nonoperative, within the meaning contended for by respondents. In the recent case entitled El Camino Irrigation District v. El Camino Land Corporation et al., Cal. Sup., 85 P. (2d) 123, this court held that an irrigation district was an agency of the state, whose functions were considered exclusively governmental; that it owns no lands in a proprietary sense, its property being owned by the state and held only for governmental purposes. The court pointed out that under section 29 of the Irrigation District Act, Deering's Gen. Laws 1931, Act 3854, pp. 1948, 1970, it was provided that property acquired by the district should be held 'in trust for', and was 'dedicated and set apart to the uses and purposes' set forth in the act. See, also, Clough v. Compton-Delevan Irrigation District et al. (12 Cal. (2d) 385) Cal. Sup., 85 P. (2d) 126; Moody v. Provident Irrigation District, Cal. Sup., 85 P. (2d) 128 (12 Cal. (2d) 389). Also, in the recent case entitled Provident Land Corporation v. Zumwalt et al., Cal. Sup., 85 P. (2d) 116 (12 Cal. (2d)

365), where the economic history of irrigation districts in this state was reviewed at some length, it was held that lands acquired by the district under the provisions of the Irrigation District Act remain in trust, and that their proceeds, whether by sale or lease, were likewise subject to the trust."

We contend that this district and this state property and this public trust can no more be subjected to the jurisdiction of the bankruptcy court than the State of California itself.

II. THERE IS ANOTHER ACTION PENDING IN THE STATE COURT.

The facts as recited show that at the time this proceeding was commenced there was an action pending under the irrigation district refinancing act. (Cal. Stats. 1937, p. 92.) Briefly this act provides that any irrigation district unable to pay its debts as they mature may initiate a proceeding for readjustment of its debts. The case is set down for hearing and if the Court finds that the plan is fair the district has the right to proceed to condemn the bonds that do not accept the plan. (Appendix p. ii.) That case had proceeded to the point where the judge ordered the interlocutory decree to be entered and then this bankruptcy proceeding was commenced and the district sought to dismiss its state Court proceeding. The effect of the pendency of those proceedings should be determined by this Court. Frankly, we urged the unconstitutionality of those proceedings in the Superior Court, but our contentions were overruled and un-

doubtedly the act is presumably constitutional. Such is the California rule. (*First National Bank v. South San Joaquin Irrigation District,* 9 Cal. (2d) 781, 72 Pac. (2d) 156.) But unless the act is declared unconstitutional, petitioners urge that that proceeding is a bar to the instant proceeding. There is no decision which determines this question and our position is that determination of this matter is requisite for the disposition of the instant case.

There is one very important section in that act which is also relevant to the question hereafter briefly discussed, namely the plan was executed fully out of Court. We refer to Section 19 from which we quote the following:

> "In the event that said petition for liquidation, refinancing or readjustment is dismissed, or that any of the provisions hereof for confirmation of the plan or acquisition of the bonds or warrants of the nonaccepting holders shall be declared invalid, such dismissal or declaration shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants accepting the same."

It appears by this section that the Legislature intended that when the plan has been adopted and accepted by the requisite number, no matter what happened thereafter, the plan was in effect as to those creditors who had accepted the plan and as to the district.

We further refer to Section 5 of the Act which provides:

> "The Court in which said petition is filed shall have exclusive jurisdiction with respect to all

suits, actions and proceedings against the district" etc. (Appendix p. i.)

It is our position that this section gave to the Superior Court exclusive jurisdiction, and until those proceedings are terminated the district cannot confer jurisdiction upon the Federal Court by filing a petition there.

III. THE CAUSE IS RES JUDICATA.

As shown the district had a proceeding under the first municipal bankruptcy act which went to judgment. (R. 149, 295.)

The lower Court's opinion in the case of *West Coast Life Insurance Co. v. Merced Irrigation District,* 114 Fed. (2d) 654, seems to take the position that no reasons were given by the Circuit Court of Appeals in the first municipal bankruptcy case there discussed, and that the decision is not *res judicata* of any question whatever.

Under the authority of the important cases of *Chicot County Drainage District v. Baxter State Bank,* 308 U. S. 371, and *Stoll v. Gottlieb,* 305 U. S. 165, it must be considered that the Court had jurisdiction to enter its judgment and thereby to determine all issues. Among these issues is the issue of unconstitutionality. This issue is precisely set forth in the record at R. 298. At this same page in the record it is shown that the first bankruptcy case came on for trial and was heard by the Court and tried on the merits, and on December 8, 1936 Judge Cosgrave entered a judgment of dismissal. It seems to us that if the

Court, under a supposedly unconstitutional statute, can as in the *Baxter State Bank* case, supra, make a binding decree that the plan is constitutional and valid as between the parties, that the Court can, under such a statute, enter a decree that the plan is unconstitutional and invalid as between the parties. This is the situation here.

We refer to the general rule that

> "The legislature may not, under the guise of an act affecting remedies, annul, set aside, or impair final judgments obtained before the passage of the act."
>
> 12 *C. J.* 984;
>
> *McCullough v. Virginia,* 172 U. S. 102.

> "The policy of the law or constitutional principle involved very clearly is that rights of property, once vested * * * by judicial decision then finally between the parties shall not afterwards be disturbed or the controversy opened by mere legislative enactment."
>
> *Lancaster v. Barr,* 25 Wis. 560, 562.

In California a judgment is a contract. *Scarborough v. Dugan,* 10 Cal. 305. In *Frost v. City of Los Angeles,* 181 Cal. 22, the Supreme Court of California said, in pointing out that an amendment of an unconstitutional statute making it constitutional does not have a retroactive effect:

> "* * * the answer is that amendments to the law do not operate upon an existing suit in a case like the present, nor have retroactive effect so as to affect the validity of a judgment rendered before the new law came into existence."

IV. THE R.F.C. IS NOT A CREDITOR AFFECTED BY THE PLAN.

The statute requires that the petition must allege that 51 per centum in amount of securities affected by the plan, excluding those owned, held or controlled by the petitioner had accepted it. The statute also requires that two-thirds of the actual amount of the claims affected by the plan must accept it before the plan is confirmed. In subdivision (a) of Section 82 it is provided that "no creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially . . ." and Section 82 provides that the terms "security affected by the plan" means security as to which the rights of the holder are to be adjusted or modified materially.

Now prior to March 1, 1934, the district applied to the R.F.C. for a loan and a loan was approved on March 1, 1934. (R. 201, 223.) The plan set up by this resolution has never been changed or modified and an election authorizing the loan (to be secured by new bonds) was held on June 15, 1934. (R. 223.) An agreement was made between the district and the R.F.C. August 7, 1934 (R. 225) and on the same date a second agreement (R. 236) was made. It was stipulated, however, that the first agreement was made before the second agreement was made. (R. 225.) Disbursement by the R.F.C. was on October 31, 1934 (R. 224) at which time the R.F.C. acquired possession of 96.76 per cent of the old bonds. (R. 224.)

On March 1, 1934 when the loan was approved there was no bankruptcy statute on this subject. The R.F.C. resolution at R. 204 states that no loan shall be made

unless all the old securities are deposited, or the R.F.C. is satisfied that a sufficiently large proportion has been deposited. Since more than 90 per cent had been deposited and the corporation actually disbursed on October 31, 1934, it seems that the Division Chief was satisfied. Subdivision (b) of Section 5 of this resolution (R. 208) provides that if the Division Chief deems it necessary to keep any of the deposited securities alive in order to maintain a "parity" of rights the loan may be made directly to owners' agents or to consenting owners, but this was not done. If the matter was to be handled by a note given by owners' agents then a note would be executed and secured with a pledge of the securities. But that was not done.

The first agreement (R. 225) seems to be entirely in accordance with the resolution of March 1, 1934. In the second agreement (R. 236) we find the proposition put forward for the first time, that the loan may be made by the R.F.C. acquiring the old securities. This does not seem to be authorized by the election the people voted on (R. 223), which was for an issue of new bonds to secure the loan, especially when we consider that the district paid considerable sums of public money for the purpose of bringing about the refinancing, which it could not do if it was merely transferring ownership from one security holder to another. Unless in fact the transaction at the time it was concluded, had the effect of then reducing the debt it was ultra vires both as to the California Statutes 1917, p. 243, and Title 43 Section 403, U. S. C.

Section 3 of California Statutes 1917, p. 243, as amended, provides that such contract must be approved at an election.

Title 43 Section 403 U. S. C. provides that no loan may be made by the R.F.C. until satisfied that a substantial reduction will be effected in the debt of the district.

The California Statute referred to does not authorize a contract for purchase of the district's old bonds.

The Federal Statute does not authorize the R.F.C., we contend, to advance any money on its loan unless such advance automatically reduces the district's debt.

Where the rights of third parties have attached the conduct of the parties is a relevant part of the transaction.

1 *Mechem, Sales,* 1901, Sec. 46, page 45.
Insurance Co. v. Dutcher, 95 U. S. 269, 273;
Topliff v. Topliff, 122 U. S. 121, 131;
District of Columbia v. Gallaher, 124 U. S. 505, 510.

Furthermore Title 15, Section 604a U. S. C. provides that a loan by the R.F.C. expires in a year and therefore the R.F.C. could not make any further disbursements out of the loan, part of which was disbursed in October, 1934. As everything had to be done within that year, the plan could not remain open.

Order No. 8 of the Districts Securities Commission (R. 278), which is the comission having fiscal supervision of the district, provides in paragraph 3 "that said refunding bonds be issued to repay the Recon-

struction Finance Corporation for equal amounts of loans provided by said corporation . . .". The second rehabilitation plan (R. 272) says that a charge will be collected to cover "interest and principal on R.F.C. loan". The same reference is found in the third rehabilitation plan. A letter from the district to the bondholders dated April 16, 1934 (R. 242) contains this statement:

> "As a result of negotiations with representatives of all groups of bondholders the district is now in a position to make the following cash offer for your bonds:"

The bondholders in their escrow agreement stated (R. 172):

> "I hand you herewith.....bonds....., which you are authorized to deliver to or upon the order of the Board of Trustees of said Palo Verde Irrigation District. . . ."

Another important link in the chain is the resolution authorizing instructions to the Security First National Bank (Respondent's Exhibit A (R. 178):

> "For the purpose of consummating the loan for which Palo Verde Irrigation District heretofore applied * * * deliver * * * for the account of the Reconstruction Finance Corporation upon collection * * * for the account of this District, of a sum equal to $1000 plus 24.81¢ per dollar of the aggregate principal amount of said bonds" (R. 179),

and then specifically instructed

> "From the proceeds received from the Federal Reserve Bank pay $1000.00 * * * also pay to Palo

> Verde Properties, Inc. * * * $5.00 for each $1000.00 of principal * * * also pay to yourselves the sum of * * * $500.00."

These instructions also provided for contributions by the district of $1158.08 towards the expense of the escrow. (R. 180.)

This resolution was adopted October 26, 1934, and it was headed "Resolution Authorizing Instructions * * * in the matter of closing Reconstruction Finance Corporation Loan Escrow."

The money advanced was paid to the district.

Now if this was an outright purchase of bonds by the R.F.C. and if that was the intention of the bondholders when they deposited their bonds in escrow and of the R.F.C. in depositing the amount of the loan with the Federal Reserve Bank and of the district, why was it necessary for the district thus to participate in the escrow? The answer is obvious. It was because the bondholders considered that they were surrendering their bonds to the district pursuant to the letter from the district that the district was now able to pay cash and to make a certain cash offer for the bonds, whereby the bonds would be paid off and cancelled, and they were therefore appropriately delivering the bonds to the district or its order.

Lastly, attention is called to the fact that the district paid some $1400.00 or $1500.00 in the transaction. (R. 177, 180.) The payment of that sum by the district fits in very well with the theory of the petitioners, that the R.F.C. made a loan to the district

and that its only right is to receive refunding bonds. It is our position that this transaction constituted a pledge securing a loan made direct to the district. (*In re Grand Union Co.,* 219 Fed. 353, 359, certiorari denied 238 U. S. 626 and appeal dismissed 238 U. S. 647; *In re Rogers,* 20 Fed. Sup. 120, 129; *Jones v. Third National Bank of Sedalia,* 13 Fed. (2d) 86; *Shelley v. Byers,* 73 Cal. App. 44.)

The transaction is to be judged by California law. (R. 225, 234.)

Furthermore the R.F.C. (R. 150, 328) filed a written consent to the plan of composition in the state Court proceedings under California Statutes, 1937, Ch. 24.

Sec. 19 enacts that where such a consent is filed the plan becomes binding on the creditor. (Appendix p. ii.)

If the bonds are held as security by the R.F.C., for a loan granted the district, then the district must be the beneficial owner of the bonds. The R.F.C. could not possibly collect more from the district on those bonds than it advanced on the loan, with interest at 4 per cent. After that has been paid, the obligation represented by those bonds would be paid. Therefore the district is the beneficial owner. Except for the effect of Section 82 which provides: "any agency of the United States holding securities acquired pursuant to contract with any petitioner under this chapter shall be deemed a creditor in the amount of the full face value thereof." and of 83 (j) providing that "the partial completion or execution of any plan of composition . . . by the exchange of new evidences of indebtedness under the plan for evidences of indebted-

ness covered by the plan, . . . shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion . . . shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition.", and except for the proposition that a governmental agency is to have its contract judged by different rules than citizens, there would seem to be no question but that the vote of the R.F.C. could not be counted in the necessary percentage.

We point out that Congress in Section 82 did not say that the R.F.C., though deemed a creditor in the amount of the full face value of the securities acquired, is to be deemed to be adversely affected by the plan of composition, nor did Congress say in Subdivision (j) of Section 83 that in a case where securities had not been exchanged the consent of the parties could be counted in determining the percentage.

We further point out that the committee on the judiciary in its report No. 1901 dated March 29, 1940, to the 76th Congress, Third Session, referring to HR9139, a bill for the amendment of Sections 81 and 83 of the Bankruptcy Act, rejected a proposed amendment to the Bankruptcy Act which would provide that acceptance of refunding bonds under a refunding plan would, of itself, constitute acceptance of the plan in bankruptcy. The committee said:

> "Your committee are of the opinion that the time element is important in this connection, and that regardless of the terms and conditions of the plan

> previously accepted by the bondholder, and even regardless of whether the plan in bankruptcy is not less favorable than the refunding plan previously accepted by the bondholder, the law should permit the bondholder to have the opportunity of accepting or rejecting the plan in bankruptcy at the time such plan is submitted to the bondholder."

Much more along the same line is said in this committee report. The point is that it indicates very strongly that Congress intended that the question of consent should have vital importance as a jurisdictional requirement. There must be consent by present creditors who must have the opportunity to say whether or not they do consent under the conditions existing at the time the bankruptcy petition is filed. Now the original Palo Verde bondholders have gone their way, it is not possible to obtain their consent. We contend that it is inequitable to permit the R.F.C. to consent for them especially where they paid only 25¢ on the dollar for those securities. The R.F.C. cannot express the independent judgment of the investing public. The R.F.C. will be beneficially affected and not adversely affected. The R.F.C. is nothing but the fiscal agent of the district. It expresses every wish and desire of the district and from the very beginning worked hand in hand with the district to secure the desired reduction of indebtedness. All that is said by this Court in *American United Mutual Life Insurance Company v. City of Avon Park,* ..... U. S. ....., 61 S. Ct. 157, on the question of consent is pertinent here, and unless this public agency should have its con-

tract weighed by different scales than the rules of law which apply to the contracts of private individuals, but one conclusion, we submit, can be reached, and that is that the consent is ineffective. We do not believe that Congress has gone so far as to say that where the R.F.C. is a party the ordinary principles of equity are not to be applied in a bankruptcy proceeding.

V. THE PLAN IS ONE FULLY EXECUTED OUT OF COURT AND NOT PURSUANT TO THE STATUTE.

In the case of *In re West Palm Beach,* 96 Fed. (2d) 85, the Court held that a plan which has been partially executed is incapable of presentation as a composition. In that case the plan has been carried out by the exchange of securities. Congress thereafter enacted subdivision (j), Section 83, providing that the partial completion of a plan of composition "by the exchange of new evidences of indebtedness" could not be construed as limiting or prohibiting the "effect of this title" and that such written consent should be included.

Petitioners question the power of Congress to pass such a statute, particularly where the statute still requires that the persons consenting shall be adversely affected in order to execute a valid consent.

We also contend that the doctrine of *inclusio unius exclusio alterius* results in the conclusion that where the loan has been made but actual securities have not been exchanged rules of equity will still apply.

If the R.F.C. is regarded as a holder of original bonds then the plan was fully effected when the first bankruptcy petition was filed and adjudicated. If this is not conclusive, then Section 19 of California Statutes, 1937, Ch. 24 (Appendix, p. ii) which provides that the effectiveness of the plan cannot be affected by the dismissal of the proceedings comes into force.

VI. THE CLAIMS ARE NOT ALL OF THE SAME CLASS.

Some of the petitioners hold an alternative writ of mandate which is still in force in the State Court requiring the payment of their matured bonds and coupons and tying up of the funds of the district. (R. 303-7.) This writ of mandate is a vested right. (*Borough of Ft. Lee v. U. S.*, 104 Fed. (2d) 275.) Furthermore, some of the petitioners are holders of judgments in the State Court and these judgments are not only against the district, but they are also against the drainage district and the levee district. (R. 315, 318.) Appeals were taken from these judgments and the appeals have not been concluded. Prima facie, these judgments are valid.

VII. THE PLAN OF COMPOSITION IS NOT FAIR, EQUITABLE, OR FOR THE BEST INTEREST OF CREDITORS AND IT IS DISCRIMINATORY.

In the first place the district is not insolvent and the rule in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, seems to require that the minimum the

plan should offer is a vastly more generous payment to the bondholders.

The bond debt of the district as disclosed by the petition was $4,174,330.36 plus a note of $4000.00. (R. 22.)

The amount of the R.F.C. loan was $1,039,423.00. (R. 13.)

The R.F.C. appears to hold in substance all the bonds except petitioners'. The holdings of the petitioners at the time of the hearing was $79,000.00.[1] (R. 58, 59.)

The assessed value of the land in the district was more than $5,000,000.00 in 1927 and approximately $3,000,000.00 in 1937. (R. 258.) The appraiser for the R.F.C. loan placed a value on the lands of $70.00 to $80.00 per acre, speaking of clear and improved land. (R. 295.) This for 30,000 acres of land which is the minimum of good land in the district, would be two and a quarter million dollars, or more than twice the amount offered the bondholders. In view of the fact that the district owned over 99 per cent of this land, the justice of the payment of twenty-five cents on the dollar is not apparent.

Second, the holders of the private mortgage bonds (Mutual Water Company) received fifty cents on the dollar of principal for their bonds, but the public bondholders receive less than 25%. (R. 180, 181.) The

1. Irrigation District Bonds $38,000.00.
Levee District Bonds $32,000.00.
Drainage District Bonds $9000.00.
Covell surrendered his $10,000.00 Irrigation District bonds but holds the coupons. Jordan owns a block of coupons from bonds already deposited.

plan proposed 24.81¢ per dollar of principal (R. 22), and the district by resolution directed the bank to "deliver" the deposited bonds "for the account of the Reconstruction Finance Corporation" upon "collection" of 24.81¢ per dollar (R. 179) but directed the bank out of this "collection" to disburse 50¢ on the dollar to the holders of Mutual Water Company bonds and 23.248¢ to the public bondholders. (R. 180.) The trust officer handling the transaction also verified this. (R. 181.) In point of law the public bondholders have a superior claim. There is no evidence before the Court anywhere justifying such discrimination. This discrimination would seemingly invalidate the plan. (*American United Mutual Life Insurance Company v. City of Avon Park,* ..... U. S. ....., 61 S. Ct. 157.)

Further, it is unjust if not unconstitutional that the state should be enriched. This district owns over 99 per cent of the land. (R. 197, 264.) It may not thus confiscate private property and public bonds to pay a public debt. (Article XI, Sec. 15, California Constitution.)

It is unfair to pay the bondholder only such amount as a bank (the R.F.C.) is willing to loan. These creditors are willing to loan more. They wish merely to keep their bonds.

Section 4 of California Statutes, 1931, p. 2263, prohibits the issue of the proposed bonds to the R.F.C. except upon a finding by the Districts Securities Commission that they do not exceed 60 per cent of the value of the bare lands plus the works of the district.

Is it not conclusive that the plan does not offer more than 60 per cent of the value of the assets?

The loan of the R.F.C. is for 33 years only. These bonds could have been issued for 50 years. Even 10 years added to the bond issue would have materially increased the amount to be paid the bondholders.

The R.F.C. as a creditor will receive 4 per cent and does receive 4 per cent interest on its claims and will receive in exchange for its claims a bond bearing 4 per cent which is tax exempt. These creditors must take cash and find a new investment.

The trust funds of the district amounting to $100,000 in cash (R. 274) already earmarked by a writ of mandate (R. 304) are taken from petitioners. *Provident Land Corp. v. Zumwalt,* 12 Cal. (2d) 365, 85 Pac. (2d) 116. Likewise other trust properties of the district, being all of the assets and properties on hand are taken from petitioners.

It is unfair to scale down the claims of these creditors when other bond issues of the county and the City of Blythe are not similarly scaled down. (R. 193.) County bonds have been paid 100¢. (R. 314.) Such bonds are not superior in point of law to petitioners' bonds. In fact, under the decision in the case of *Anderson-Cottonwood Irrigation District v. Klukkert,* 13 Cal. (2d) 191, 88 Pac. (2d) 685, this district now owns all the land in the district free of right of the county to levy taxes upon it and these county bonds could only be collected if, as and when these lands go back on the tax roll and pass out of the hands of the irrigation district. Thus the irrigation

district could operate these lands under leases and provide a much greater payment for the benefit of the bondholders. Yet the plan of composition is in no way based upon the value of the water rights, canals and lands.

The petitioners, who are holders of levee bonds, have a right to an assessment against the personal property as well as the real property of the landowners and this right was in no way taken into consideration. (1905 Cal. Stats. Ch. 310, Sec. 10.) (Appendix p. v.)

VIII. THE PLAN OF COMPOSITION IS NOT PRESENTED IN GOOD FAITH.

The hearing in this case lasted approximately an hour and a half and the evidence consisted of the transcript of proceedings taken in a former hearing in the state Superior Court. The S.E.C. does not intervene in these proceedings. The trial of such a cause is not a proceeding between two adverse parties, but one in which the Court itself should take an active hand.

First National Bank v. Florsheim, 290 U. S. 504, 525;

National Surety Co. v. Coriell, 289 U. S. 426, 436.

A long list of harassments by the district include injunctions against the prosecution of these petitioners' rights in the State Court. These injunctions have been outstandingly effective since 1935.

The execution of the second agreement, Exhibit 20 (R. 236) amounts to connivance by the R.F.C. to establish ownership by that agency of the bonds. There is an old saying that what everyone knows must be true, and in this case everyone knows that this district has already been refinanced. The fiction is maintained by the conduct of these parties through such documents as Exhibit 20.

Lastly the district contributed approximately $1450 to the purchase of the bonds by the R.F.C. (R. 170, 180-181.) Thus these bonds are in some sense within the control of the district. The fact that the escrow agreement showed that the bondholders surrendered them to the order of the district, shows that that control is a real thing.

Much we have said supra under IV the R.F.C. is Not a Creditor Affected by the Plan, applies here.

IX. THE STATE AS A DEBTOR CANNOT REPUDIATE ITS OBLIGATIONS.

Since the district actually owns title to 99.66 per cent of the real estate and the state issued these bonds subject to the limited right to collect them from the state out of assessments on properties in this district, the state in this case would appear as the owner of the property to be in a peculiar sense the debtor of the bonds. The State of California owning the bonds and assets including its valuable water rights on the Colorado River (R. 186) coming into Court to destroy this public trust which is established by its own

statutes, seems to run counter to any concept of equity. These bonds bear the seal of the state and the certificate of the state controller irrevocably certifying them as lawful investments for savings banks, trust funds and the like. (See Appendix p. xvi.) There is certainly room for argument that within the meaning of the constitution the bankruptcy concept does not embrace the state. (Minority opinion by Mr. Justice Cardozo in *Ashton v. Cameron County Water Improvement District No. 1,* 298 U. S. 513, 56 S. Ct. 892.)

X. THE DECREE UNLAWFULLY TAKES TRUST FUNDS AND VESTED RIGHTS.

Appellant Jordan has a judgment against the Palo Verde Drainage District, the Palo Verde Joint Levee District of Riverside and Imperial Counties, California. (R. 300, 315, 318.) First Bank of Tustin likewise has a judgment against the drainage district. These judgments are not final because appeals were taken. They are judgments and contracts. The judgment is property and a vested right. They are judgments against other debtors than the bankrupt. Release of one party to the liability does not necessarily release the others.

Each of the petitioners has a vested right in the writ of mandate which impounded certain funds.

That the assessments are trust properties has long been the law of California. (*LaForge v. Magee,* 6 Cal. 650, 651; *People v. Bond,* 10 Cal. 563 at 573,

574.) Section 29 of the Palo Verde Irrigation District Act as amended in 1927, California Statutes, 1927, page 972, at 997, reads as follows:

> "All moneys collected from the district, either from taxes or from any other source, shall be paid by the collector to the county treasurer of the county of Riverside and placed in a fund to be called 'Palo Verde irrigation district fund.' It shall be the duty of said county treasurer, upon presentation of any matured bond or interest coupon of any bond of any of said three districts, to pay the same from said fund."

Section 10, Subd. 5 of the Palo Verde Irrigation District Act provides as follows:

> "The legal title to all property acquired under the provisions of this act shall immediately, by operation of law, vest in the district, and shall be held by the district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this act. And said board is hereby authorized and directed to hold, use, manage, keep and possess, said property as herein provided." (Appendix p. viii.)

This is substantially the same provision as Section 29 of the California Irrigation District Act which was interpreted by the Supreme Court in a number of cases, particularly in the case of *Provident Land Corp. v. Zumwalt,* 12 Cal. (2d) 365, 85 Pac. (2d) 116, where the Court said:

> "the lands remain in trust, and the district exercises its powers, however broad, as a trustee. Once it is made clear that the lands are held in

trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust. It would be manifestly absurd to say that although property is held in trust, none of the benefits of the trust accrue to the beneficiaries, and that none of the rents or profits of the trust property need be used in furtherance of the trust purposes. On this point, namely, that the land is trust property, held for the 'uses and purposses' of the act, and that the proceeds are stamped with the character of the property from which they flow, the statute, read in the light of elementary principles, leaves no room for debate."

"It next becomes necessary to determine whether payment of the bondholders is one of these purposes. * * * defendants and amici curiae vigorously contend that * * * creation of debts is not one of its purposes. * * * This type of argument, however, tends to prove too much * * * But laying aside quibbles as to the exact meaning of the phrase 'uses and purposes', it seems clear that if the district is to be created and to function on borrowed money, repayment of the money is not a wholly immaterial and foreign objective. Evading creditors is not a contemplated activity of a public district, whose bonds are recognized investments for financial institutions. Among other purposes of the act, therefore, is the repayment of the bondholders of the district, and it follows that this is one of the purposes for which the trust money is held."

"The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid * * * Any practice which removes the land from its position as ultimate

> security for the bonds, or which places its proceeds beyond the reach of the bondholders, destroys that plan and is contrary to the spirit of the act."

Thus all the lands, cash and other assets of the district are trust properties right to which is vested in petitioner.

XI. THE LIABILITY OF THE LEVEE DISTRICT AND OF THE DRAINAGE DISTRICT AND OF THE COUNTY OF RIVERSIDE WAS NOT TAKEN INTO CONSIDERATION BY THE COURT.

We present the sole proposition here that Section 12 and 13 of the Palo Verde Irrigation District Act (Appendix pp. ix, xiii) preserved the existence of these districts in order to preserve their liability and a bankruptcy decree which terminates the liability of the Palo Verde Irrigation District does not terminate the liability of these other agencies.

XII. THE LOWER COURT ERRED IN HOLDING THAT CERTAIN POINTS WERE NOT PRESENTED TO THE TRIAL COURT.

Chapter IX of the Bankruptcy Act provides that any creditor may file an answer. Section 83 (b). The section goes on to provide that the Court may not confirm the plan unless the Court is satisfied that the plan is fair, that it complies with the provisions of the chapter and is properly accepted, the amounts paid by petitioner are reasonable, the plan is in good faith, and so forth. It would appear therefore that any creditor could appeal if the decision did not properly establish these essentials.

However, the petitioners did raise each and every one of their points in their answer (R. 57) and the case was tried in the Superior Court on similar objections and the record is full of objections made to the introduction of testimony, motions, stipulations and vidence bearing out that the case was tried on the theory of the objections raised. The narrative statement of evidence shows (R. 147) that the cause came on for hearing upon the petition and the answer and objections of the respondents. The minute order of the Court (R. 91) shows that the objections filed by the appellants were overruled. Since the three oral objections made to the introduction of testimony at the opening of the hearing were not written objections, they were not filed, and the Court must have referred to the other objections. The stipulation of the parties (R. 46) shows that the transcript of evidence was introduced with the objections and rulings thereon. An example of an objection to the testimony is shown at R. 265. A written stipulation (R. 295 to 307) covered evidence on many points which have been urged by petitioners. This Court below stated that propositions 4 and 6 to 13 were not urged in the trial Court. (114 Fed. (2d) at 694.) Categorically proposition 4 was presented by the answer. (R. 60-62.) Proposition 6 by the answer. (R. 63.) Proposition 7, the answer twice denies the plan is fair. (R. 61-64.) Proposition 11 is covered at R. 66. Proposition 13 is specifically alleged in the answer. (R. 67.) Several of the points were again called to the trial court's attention in our objections to the Findings. (R. 124.)

CONCLUSION.

It is submitted that a writ of certiorari should be granted, the decree of the Court below reversed and the proceeding directed to be dismissed.

Dated, Turlock, California,
January 6, 1941.

Respectfully submitted,
W. COBURN COOK,
Counsel for Petitioners.

(Appendix Follows.)

Appendix

IRRIGATION DISTRICTS REFINANCING ACT.

CAL. STATS. 1937, CHAPTER 24.

* * * * * * *

SEC. 5. Automatic Stay. Plan Temporarily in Effect. The filing of such petition shall operate automatically to enjoin and stay, pending final determination of the proceedings as herein set forth, the commencement or continuance of suits or proceedings against the district or any officer or board of directors thereof which would interfere with or prevent the carrying out of the plan, and shall also operate automatically to enjoin and stay the enforcement of any lien or the levy of assessments except in so far as is consistent with and in furtherance of such plan. The Court in which said petition is filed shall have exclusive jurisdiction with respect to all suits, actions and proceedings against the district filing such petition or any board of directors or officer thereof on account of the indebtedness of such district proposed to be liquidated, refinanced or readjusted by such plan or to enforce any lien or the levy of any assessments for the payment of such indebtedness and all matters incidental and collateral thereto and it shall be deemed that said plan is temporarily in full force and effect. It is hereby found and declared that proceedings for or the issuance or enforcement of a writ of mandate or other action or proceeding to enforce any lien or to enforce the levy of assessments for the payment of such indebtedness other than as provided

in such plan would, during pendency of said proceeding, result in disorder and confusion and destruction of joint, relative and correlative rights of creditors affected by said plan and injury of third persons.

* * * * * * *

SEC. 11. Judgment of Acquisition, Cancellation and Condemnation. After determining the value of the bonds or warrants owned by the nonaccepting holders as aforesaid, the Court shall enter a judgment of acquisition, cancellation and condemnation by said district of all bonds or warrants of nonaccepting holders for the price and at the value fixed and determined as aforesaid.

* * * * * * *

SEC. 19. Consent of Accepting Bond or Warrant Holders Not Affected by Invalidity of any Portion of this Act or Dismissal of Petition. In the event that said petition for liquidation, refinancing or readjustment is dismissed, or that any of the provisions hereof for confirmation of the plan or acquisition of the bonds or warrants of the nonaccepting holders shall be declared invalid, such dismissal or declaration shall not affect the effectiveness of the plan with respect to the district or holders of bonds or warrants accepting the same.

* * * * * * *

PORTIONS OF STATUTES RELATING TO PALO VERDE DRAINAGE DISTRICT.

CAL. STATS. 1903, CHAPTER CCXXXVIII.

An act to provide for the organization and government of drainage districts, for the drainage of agricultural lands other than swamp and overflowed lands, and to provide for the acquisition or construction thereby of works for the drainage of the lands embraced within such districts.

* * * * * * *

SEC. 26. The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such drainage district, and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this act. And said board is hereby authorized and empowered to hold, use, acquire, manage, occupy, and possess said property as herein provided. The said board is hereby authorized and empowered to take conveyances or other assurances for all property acquired by it under the provisions of this act, in the name of such drainage district, to and for the uses and purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect, or preserve any and all rights, privileges and immunities created by this act, or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings, the said board may sue,

appear, and defend in person or by attorneys, and in the name of such drainage district.

* * * * * * *

SEC. 30. Any bonds issued under the provisions of this act shall be a lien upon the property of the district and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue. Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments as hereinafter provided.

* * * * * * *

SEC. 42. The board of supervisors of each county wherein is situated a district or any part thereof organized under the provisions of this act, must, annually, at the time of levying county taxes, levy a tax to be known as the "..... (name of district) drainage district tax," sufficient to raise an amount reported to them as herein provided, by the board of directors.

* * * * * * *

PORTIONS OF STATUTE RELATING TO PALO VERDE JOINT LEVEE DISTRICT OF RIVERSIDE AND IMPERIAL COUNTIES, CALIFORNIA.

CAL. STATS. 1905, CHAPTER CCCX.

An act to provide for the formation of levee districts in the various counties of this State and to provide for the erection of levees, dikes and other works for the purpose of protecting the lands within such districts from overflow and to levy assessments to erect and construct and maintain such levees, dikes and other works and to pay the necessary costs and expenses of maintaining said districts.

* * * * * * *

SEC. 10. At the time when by law it is the duty of the board of supervisors of such county to fix the annual tax rate for such county, the said board of supervisors, taking as a basis the last previous report of the commissioners as hereinbefore specified, and adopted by them, for the amount of moneys necessary to be raised in said district for the purposes thereof for that year, and the valuation of the lands and improvements thereon within such district as furnished them by the county assessor, must levy a tax upon all taxable property in such levee district sufficient to raise the amount set forth in the report as made by said commissioners and adopted by said board of supervisors.

* * * * * * *

CAL. STATS. 1911, CHAPTER 139.

* * * * * * *

SECTION 1. Any levee district formed or organized by or under the laws of California, may incur a bonded indebtedness for the purpose of building, constructing, or repairing the levee or levees of such district; or in excavating or constructing any ditches or canals of such district; or for the purpose of acquiring rights of way for any such levee, or ditches, or canals; or for any and all of said purposes. Such indebtedness shall be incurred in the following manner, to-wit:

* * * * * * *

SEC. 9. The board of directors or trustees shall cause to be assessed and levied each year upon the assessable property of the district, in addition to the levy authorized for other purposes, a sufficient sum to pay the interest on outstanding bonds, * * *

PORTIONS OF STATUTE RELATING TO PALO VERDE IRRIGATION DISTRICT.

CAL. STATS. 1923, CHAPTER 452.

* * * * * * *

SECTION 1. The State of California and the people thereof are hereby declared to have a primary and supreme interest in securing to the inhabitants and property owners of the low irrigable lands within what is known as the "Palo Verde valley," in Riverside and Imperial counties, the greatest possible use, conservation and protection of the waters of the Colorado river to the extent that the same may be lawfully diverted to their lands, to the end that their water system, their land, structures and other properties may be protected from overflow of the flood waters of said river, their swamp lands drained, and thereby the greatest productivity of the largest possible area may be accomplished and safely carried on within reasonable limits of economy.

Investigation having shown conditions in the Palo Verde valley to be peculiar to that valley, it is hereby declared that a general law cannot be applicable thereto, and the enactment of this special law is therefore necessary for the proper distribution and use of the waters available to the valley, the protection of the valley against inundation, the reclamation of the swamp lands, and financing the development of the valley by the means herein provided.

SEC. 2. There is hereby created, subject to the approval of the owners of property within the district as hereinafter provided, a unified irrigation, protec-

tion and reclamation district, to be known and designated as, "Palo Verde irrigation district," hereinafter in this act referred to as the "district," and which shall comprise all of the lands now included both within the boundaries of the Palo Verde joint levee district of Riverside and Imperial counties, California, and the Palo Verde drainage district, both of which are now in existence, and the boundaries of the district proposed to be created by this act are more particularly described as follows:

* * * * * * *

SEC. 10. Subd. 5. The legal title to all property acquired under the provisions of this act shall immediately, by operation of law, vest in the district, and shall be held by the district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this act. And said board is hereby authorized and directed to hold, use, manage, keep and possess, said property as herein provided. The board may determine by resolution duly entered upon its minutes, that any property, real or personal, held by such irrigation district, is no longer necessary to be held for the uses and purposes thereof, and may thereafter sell such property, and a conveyance of any property held by this district, executed by the president and secretary thereof, in accordance with the resolution of the board of trustees of such district, when sold for a valuable consideration, shall convey a good title to the property so conveyed.

* * * * * * *

SEC. 11. Acquiring or Controlling the Water System of the Palo Verde Mutual Water Company. As

soon as may be practicable after the organization of the district, the board of trustees is empowered and it shall be its duty to take steps for the acquisition of the water rights and water system of the Palo Verde Mutual Water Company and its stockholders, in the manner authorized and provided by this section, as follows:

* * * * * * *

Subdivision 4. The use of all water required for the irrigation of lands within this district, and for domestic and other incidental and beneficial uses within the district, together with the rights of way for canals and ditches, the headworks, conduits, reservoirs and sites for reservoirs, and all other property required in full carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulations and control of the state in the manner prescribed by law.

SEC. 12. Taking Over the Properties and Functions of the Palo Verde Joint Levee District. The district is authorized and empowered, through its board of trustees, to take over the properties, property rights and functions of the Palo Verde joint levee district of Riverside and Imperial counties, California, and it shall be the duty of the board of trustees to take the necessary steps for acquiring the same in the following manner:

Upon approval of the property owners, of the creation and organization of this district by a majority vote, at an election to be held for that purpose as hereinbefore provided, and as soon as the organization of

the district is complete by the election and qualification of its officers, all of the levees, properties, property rights and functions of the Palo Verde joint levee district above mentioned, shall revert to and become vested in this district, but subject, however, to the rights of the holders of any and all of the bonds or other outstanding claims or evidence of indebtedness of said Palo Verde joint levee district, and the lien of all such bonds and all rights of the bondholders and creditors of said levee district shall be unimpaired and enforcible against the lands and property owners within the boundaries of said joint levee district to the same extent and in like manner as if this act had not been passed, and said district continued to exist; *but provided, however,* that all of such outstanding bonded or other indebtedness shall be assumed by this district, and the collection of principal and interest may be enforced through this district in like manner as it might have been enforced through the joint levee district, and the board of trustees of this district is hereby authorized and empowered, and it shall be its duty to carry into effect and perform, all of the obligations undertaken by said levee district through this district, and the trustees thereof, for the assessment and collection of taxes for the payment of the principal and interest of said bonds and other indebtedness, and all other obligations and duties in every other respect provided for the protection, payment and liquidation of the principal and interest of the bonded and other indebtedness of said joint levee district.

All bondholders and creditors or other persons having rights or relations with said joint levee district or

the trustees or officers thereof are hereby authorized and empowered to deal with the trustees of this district, and to enforce their rights as against this district in like manner as might be done against the joint levee district above mentioned and the trustees and officers thereof, and all notices, demands, tenders or other dealings that might have been had with said joint levee district or the trustees or officers thereof may be made to or had with the trustees of this district with the same force and effect. Likewise, all obligations or duties or indebtedness undertaken or contracted to be paid or performed by any persons, firms or corporations, to or with said joint levee district, may be enforced for or paid to this district with the same force and effect, and in like manner as undertaken to be performed for or paid to said joint levee district. And this district shall have the right to enforce all rights or obligations which have accrued or may accrue to said joint levee district.

The trustees of this district, as soon as they qualify and are organized as hereinbefore provided, shall take over and become vested with the management of all levees, properties, records, moneys on hand or other assets of said joint levee district, and the trustees of said joint levee district shall deliver all of such property, records or other assets to the trustees of this district, and thereupon said district shall be deemed to be merged in and superseded by this district, and cease to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors; *provided, however,* that all funds or properties which come into the possession or under the control of this

district from said levee district shall be expended and used only in connection with the joint levee district work, and for the purposes authorized by the act under which it was created.

The title to all properties of the joint levee district and all property and other rights belonging to or existing in favor of said district are hereby vested in this district, and this district shall have the right to maintain suits or other proceedings necessary for the protection and enforcement of any of the rights of said levee district, and may be sued and shall have the right to defend in like manner as suits might have been maintained or defended if said levee district had continued to exist.

Upon the taking over of the property and affairs of said levee district, the board of trustees of this district is authorized and empowered, and it shall be its duty, to proceed as rapidly as may be practicable with the necessary construction work for the improvement, extension and better protection and preservation of the water system, the lands and inhabitants within the district, against overflow of flood waters from the Colorado river, and to maintain and operate the same to the end of preventing if possible a repetition of the devastating floods of previous years. In that behalf and for that purpose the board is authorized to cooperate with the United States government, the government of the State of Arizona or of the State of California, or any other public agencies, departments, districts or private concerns, or individuals, in any joint project that may be undertaken for straightening or changing the course of the channel of the Colorado

river or keeping the same within its levees and banks, provided the board of trustees deem it advisable to do so.

SEC. 13. Taking Over the Properties and Functions of the Palo Verde Drainage District. The district is authorized and empowered, through its board of trustees, to take over the properties, property rights and functions of the Palo Verde drainage district, and it shall be the duty of the board of trustees to take the necessary steps for acquiring the same in the following manner:

Upon approval of the property owners of the creation and organization of this district by a majority vote, at an election to be held for that purpose as herein provided, as soon as the organization of the district is complete by the election and qualification of its officers, all of the canals, properties, property rights and functions of the Palo Verde drainage district above mentioned, shall revert to and become vested in this district, but subject, however, to the rights of the holders of any and all of the bonds or other outstanding claims or evidence of indebtedness of said Palo Verde drainage district, and the lien of all such bonds and all rights of the bondholders and creditors of said drainage district shall be unimpaired and enforcible against the lands and property owners within the boundaries of said drainage district to the same extent and in like manner as if this act had not been passed, and said district continued to exist; *but provided, however,* that all of such outstanding bonded or other indebtedness shall be assumed by this district, and the collection of principal and interest may be enforced

through this district in like manner as it might have been enforced through the drainage district, and the board of trustees of this district is hereby authorized and empowered, and it shall be its duty to carry into effect and perform all of the obligations undertaken by said drainage district, and the trustees thereof for the assessment and collection of taxes for the payment of the principal and interest of said bonds and other indebtedness, and all other obligations and duties in every other respect provided for the protection, payment and liquidatiton of the principal and interest of the bonded and other indebtedness of said drainage district.

All bondholders and creditors or other persons having rights or relations with said drainage district or the trustees or officers thereof are hereby authorized and empowered to deal with the trustees of this district, and to enforce their rights as against this district, in like manner as might be done against the drainage district above mentioned, and the trustees and officers thereof, and all notices, demands, tenders or other dealings that might have been made to, or had with the said drainage district or the trustees or officers thereof may be made or had with the trustees of this district with the same force and effect. Likewise, all obligations or duties or indebtedness undertaken or contracted to be paid or performed by any persons, firms or corporations, to or with said drainage district, may be performed for or paid to this district with the same force and effect, and in like manner as undertaken to be performed for or paid to said drainage district. And this district shall have the

right to enforce all rights or obligations which have accrued or may accrue to said drainage district.

The trustees of this district, as soon as they qualify and are organized as hereinbefore provided, shall take over and become vested with the management of all canals, reclamation work, properties, records, moneys on hand or other assets of said drainage district, and the trustees of said drainage district shall deliver all of such property, records or other assets to the trustees of this district, and thereupon said district shall be deemed to be merged in and superseded by this district, and cease to exist except in so far as may be necessary to preserve the rights of bondholders and other creditors; *provided, however,* that all funds or properties which come into the possession or under the control of this district from said drainage district shall be expended and used only in connection with the drainage district work, and for the purposes authorized by the law in pursuance of which it was organized.

Upon the taking over of the property and affairs of said drainage district, the board of trustees of this district is authorized and empowered, and it shall be its duty to proceed as rapidly as may be practicable, with the necessary construction work for the improvement and better drainage and reclamation of the lands and improvements within the district, and to maintain and operate the same to the end that the greatest area within this district may be rendered cultivable. In that behalf and for that purpose the board is authorized to cooperate with the United States govern-

ment, the government of the State of Arizona or of the State of California or any other public agencies, departments, districts or private concerns, or individuals, in any joint project that may be undertaken for the drainage or other reclamation work for the protection or improvement of the district in so far as the board of trustees deem it advisable to do so.

* * * * * * *

SEC. 17. Provisions for making bonds legal investments for trust funds, etc. Whenever the board of trustees shall by resolution declare that it deems it desirable that any contemplated or outstanding bonds of said district, including any bonds authorized but not sold, shall be made available for the purposes provided for in section seven of an act of the legislature of the State of California entitled, "An act relating to bonds of irrigation districts, providing under what circumstances such bonds shall be legal investments for funds of banks, insurance companies, and trust companies, trust funds, state school funds and any money or funds which may now or hereafter be invested in bonds of cities, cities and counties, counties, school districts or municipalities, and providing under what circumstances the use of bonds of irrigation districts as security for the performance of any act may be authorized," approved June 13, 1913, as amended, the said board of trustees shall thereupon file a certified copy of such resolution with the commission created by, and provided for in, said act, which commission, and the state controller in connection therewith, are hereby given the same power and authority in respect of the investigation and certification of

bonds issued under this act as is given to them in respect of the investigation and certification of irrigation district bonds by said act, as amended, except as the same may be limited by, or inconsistent with, any provision of this act, and bonds of said district which have been so investigated and certified and declared to be legal investments for the purposes stated in said act approved June 13, 1913, as amended, may be lawfully purchased or received in pledge for loans by savings banks, trust companies, insurance companies, guardians, executors, administrators, and special administrators, or by any public officer or officers of this state or of any county, city, or city and county, or other municipal or corporate body within this state having or holding funds which they are allowed by law to invest or loan; *provided, however,* that where said commission has passed upon one issue of bonds of said district, all subsequent issues of said district shall be submitted to said commission as in the said act provided.

* * * * * * *

SEC. 24. Paid by Annual Assessment. All bonds issued and the interest thereon shall be paid from revenue derived from an annual assessment upon the land within the district and the improvements thereon, and all said properties within the district shall be and remain liable to be assessed for such payment, as hereinafter provided, in so far as any bonds created or authorized under the provisions of this act are concerned; but with respect to all bonds that have been issued and sold, or which may hereafter be sold, of the said Palo Verde joint levee district and the Palo

Verde drainage district, the interest and principal thereof shall be paid from revenue derived from the annual assessment upon the properties within the boundaries of said respective districts, which are taxable therefor under the provisions of said bonds and the acts in pursuance of which they were created.

* * * * * * *

SEC. 56. Bonds Are a Lien on Property. Any bonds issued under the provisions of this act shall for funding or refunding purposes, be a lien upon the real property of the district, and said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district and improvements, and all such property in said district shall be and remain liable to be assessed for such payments as hereinbefore provided.

* * * * * * *

Due service and receipt of a copy of the within is hereby admitted

this_____day of January, 1941.

_____

Counsel for Respondent.

FILED
FEB 3 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.
No. 696

MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Martin Bekins, deceased; MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Katherine Bekins, deceased; JAMES IRVINE, J. R. MASON, JAMES H. JORDAN, A. HEBER WINDER, as trustee of Eva A. Parrington Trust; C. A. Moss, and H. E. CURTIS, creditors of Lindsay-Strathmore Irrigation District,

Petitioners,

v.

LINDSAY-STRATHMORE IRRIGATION DISTRICT, an insolvent taxing agency,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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of Mitchell, Silberberg, Roth & Knupp,
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JAS. R. MCBRIDE,
Lindsay, California,
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Petitioners,

v.

LINDSAY-STRATHMORE IRRIGATION DISTRICT, an insolvent taxing agency,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondent is one of a number of California irrigation districts, the financial difficulties of which led to applications for relief under Chapter IX of the Bankruptcy Act. Respondent was the appellant in the case in which this

court determined the Act, as applied to such a district, to be a constitutional exercise of the bankruptcy power.[1] The plan of composition was confirmed by the trial court. [Opinion R. 131.] On appeal the judgment was affirmed. [R. 536.][2] In the Circuit Court, appeals from judgments confirming plans for the composition of the debts of this and four other irrigation districts, were argued and decided contemporaneously.[3] Certiorari has been denied in two of these cases.[4] Respondents contend: I, no reasons of the character required (Rule 38, Sub. 5) exist for granting certiorari in this case; II, all grounds urged in support of the petition, other than the fairness of the plan, have in effect been raised and disposed of by the denial of certiorari in the Merced and Corcoran cases; III, the plan is fair and equitable.

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(1) *United States v. Bekins* (1938), 304 U. S. 27.

(2) *Bekins v. Lindsay-Strathmore Irr. Dist.* (1940), 114 F. (2d) 680.

(3) *West Coast Life Ins. Co. v. Merced Irr. Dist.* (1940), C. C. A. 9, 114 F. (2d) 654. Cert. denied Jan. 6, 1941;

Moody v. James Irr. Dist. (1940) C. C. A. 9, 114 F. (2d) 685;

Newhouse v. Corcoran Irr. Dist. (1940), C. C. A. 9, 114 F. (2d) 690. Cert. denied Jan. 6, 1941;

Jordan v. Palo Verde Irr. Dist. (1940), C. C. A. 9, 114 F. (2d) 691.

(4) *West Coast Life Ins. Co. v. Merced Irr. Dist., supra; Newhouse v. Corcoran Irr. Dist., supra.*

ARGUMENT.

I.

No Reason for the Issuance of the Writ Appears.

The assertions made by the petitioners do not constitute a showing that the aims or purposes of certiorari would be served by the issuance of the writ here.

The previous decision of this court in this case[5] settles all principles of federal law controlling the decision here and the Circuit Court did not decide any new question of federal law.

In its previous decision in this case this court stated its inquiry to be— ". . . whether the exercise of the federal bankrupcy power in dealing with a composition of the debts of the Irrigation District upon its voluntary application and with the state's consent must be deemed to be an unconstitutional interference with the essential independence of the state, as preserved in the Constitution,"[6] and all of the elements of that question remain unchanged. Regardless of any of the subsequent decisions in the state court, this proceeding nevertheless remains (1) a composition proceeding; (2) voluntarily brought by the District in its capacity as a debtor treating with its creditors; (3) with the state's consent; and (4) under and in conformity with a constitutional bankruptcy act. Respondent submits it to be clear that a subsequent decision by the state court to the effect that an irrigation district cannot own land in a proprietary sense, does not unsettle or disturb, or conflict with any of the principles of law which controlled this court in its previous decision in this case, or the Circuit Court

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(5) *United States v. Bekins, supra.*
(6) *United States v. Bekins, supra,* at p. 49.

in the decision sought to be reviewed. In fact such decisions simply reiterate the view of the settled state law applied by the District Court in the decision[7] from which the appeal was previously taken to this court. It is not shown that the Circuit Court had occasion to or did decide any question of state law differently than the state court would have decided it, nor in what manner the subsequent decisions in the state court conflict with state law as it was established when this case was previously before this court.

On the other hand the decisions in all the federal courts[8] show a striking uniformity and agreement as to the controlling rules of law and it is submitted that noth-

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(7) *In re Lindsay-Strathmore Irrigation District* (1937), 21 F. Supp. 129, at 134 (6);
See, also, *In re Corcoran Irr. Dist.* (1939), 27 F. Supp. 322 at 328, comment on the state decisions.
Peoples State Bank v. Imperial Irrigation District, 15 Cal. (2d) 397.

(8) *Luehrmann v. Drainage Dist.* (1939), C. C. A. 8, 104 F. (2d) 696. Cert. denied (1939), 308 U. S. 604;
American Nat. Bank etc. v. City of Sanford (1940), C. C. A. 5, 112 F. (2d) 435. Cert. denied Oct. 14, 1940. 85 L. Ed. Adv. 70;
Davis v. City of Homestead (1940), C. C. A. 5, 112 F. (2d) 438. Cert. denied Oct. 14, 1940. 85 L. Ed. Adv. 70;
Vallette v. City Vero Beach (1939), C. C. A. 5, 104 F. (2d) 59. Cert. denied (1939), 308 U. S. 586;
Supreme Forest v. City Belton (1938), C. C. A. 5, 100 F. (2d) 655;
Getz v. Edinburg etc. (1939), C. C. A. 5, 101 F. (2d) 734. Petition cert. dismissed on motion petitioner. 308 U. S. 628;
West Coast Life Ins. Co. v. Merced Irr. Dist. (1940), C. C. A. 9, 114 F. (2d) 654. Cert. denied;
Moody v. James Irr. Dist. (1940), C. C. A. 9, 114 F. (2d) 685;
Newhouse v. Corcoran Irr. Dist. (1940), C. C. A. 9, 114 F. (2d) 690. Cert. denied;
Jordan v. Palo Verde Irr. Dist. (1940), C. C. A. 9, 114 F. (2d) 691;
Fano v. Newport Heights Irr. Dist. (1940), C. C. A. 9, 114 F. (2d) 563. Plan held unfair.

ing would be gained by the issuance of the writ here, except (1) a re-weighing of the evidence, and (2) the consequent re-examination, perhaps, of the Circuit Court's application of settled rules of law thereto.

The writ should not issue when its only purpose would be to re-examine disputed questions of fact or to preclude any theoretical possibility of error in the application of settled and accepted law.[9]

II.

All Grounds Urged in the Support of the Petition, Other Than the Fairness of the Plan, Have in Effect Been Considered and Disposed of by the Denial of Certiorari in Cases Presenting Identical Questions.

Upon consideration of this case in the court below, express reference was made in the court's opinion to the fact that many of the propositions relied upon by appellants there, petitioners here, for reversal had been expressly considered and rejected. Twelve points were urged in the court below, and of these all but three are answered by reference to the decision in the *Merced* case. [R. 539-540-542.] The three points not con-

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(9) *General Talking Pictures v. Western Electric* (1937), 304 U. S. 175;

See also, *Address By Hughes*, C. J. (1934), 20 Am. B. A. J. 341;

cluded by the *Merced* case but answered by the opinion in this case were: (1) Good faith of the District. The trial court found that the plan was filed in good faith. The contention of appellant to the contrary is dismissed with the statement that "There is no merit in appellant's contentions that the record does not sustain this finding." [R. 543.] (2) Fairness of the plan. The evidence is considered and the conclusion is reached that the amount offered under the plan "is all that the bondholders can reasonably expect under the circumstances." [R. 544.] Later herein there is set forth briefly, the circumstances supporting the finding that the plan is fair, just and equitable. (3) Findings of the court. The argument on this point was considered to be without substance. [R. 544.]

Insofar as petitioners seek to urge, as grounds for granting certiorari, erroneous determination of questions submitted to the court below, attention is therefore necessarily directed to the same points made in petitions for certiorari in the *Merced* and *Corcoran* cases. Examination of the petitions for certiorari and the accompanying briefs filed in the *Merced* and *Corcoran* cases will show that the petition in this case presents nothing new. This court has determined that the petitions in those cases present no sufficient grounds for review.

III.

The Plan Is Fair, Just and Equitable.

The court below, after reviewing the evidence, concludes: "The record contains tabulations of tax performance which clearly indicate the soundness of the trial court's finding that the proposed plan 'is in every respect fair, equitable and for the best interests of all creditors.' It seems clear to us that 59.978 cents on the dollar of principal amount of their bonds is all that the bondholders can reasonably expect in the circumstances." [R. 544.] The trial court considered at some length, the evidence of ability to pay and determined that the amount offered under the plan was all that the resources of the District would sustain. [R. 132-133.][10] Without financial assistance from the Reconstruction Finance Corporation it is clear no offer approaching that made under the plan would have been possible.

The District, for many years prior to July 1, 1933, met all its obligations, bonded indebtedness, heavy litigation expenses and costs of operation. Its inability to do so subsequent to that date is clearly explained by the record. The cultivated area within the District is planted almost exclusively to citrus fruits and approximately ninety per cent of the income of property owners within the District is derived from that source. [R. 303.] Prior to 1930 the average price per box received for oranges was $1.50 to $2.00. [R. 321.] Commencing with 1930 the price declined and the average for the five years preceding the hearing was in the neighborhood of 50 cents to 55 cents. [R. 321.] The ruinous fall of prices

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(10) *In re Lindsay-Strathmore Irr. Dist.* (1939), 25 F. Supp. 988.

is graphically shown by charts of actual returns to growers. [R. 305-315.] The gross returns of one packing association for the fruit of the same landowners fell from over $4,000,000 in 1930, to $1,115,000 in 1937 and never reached a total of $2,000,000 in any year after 1931. [R. 315.]

The result of this market condition was an average operation loss to landowners of $13.75 per acre over the eight years from 1930 to 1938. [R. 307.] Delinquency reached its peak of 47% in 1932. [R. 331.] Thereafter the District subjected itself to Section 11 of the California District Securities Commission Act and levied only such assessments as the lands were able to pay. [R. 332.] As a result of the delinquencies the District had acquired by tax deed in 1936, over 5,000 acres of land, more than one-third of the land within the District. [R. 331.] The total defaulted debt on October 1, 1938, was $967,920.57. [R. 327.] Bonds fell as low as 27 and at the time the application for a loan was granted were quoted at 31. [R. 358]. It is not difficult to understand from this picture why 87% of the credits [R. 350] welcomed the proposed offer of funds from Reconstruction Finance Corporation and voluntarily assented to the plan.

Petitioners concede [Pet. p. 13] that the District was not able to pay its obligations as they matured, but deny that it was insolvent in the sense that its assets were less than its liabilities. Reference is made to a financial statement showing "an excess of assets over liabilities of $731,544.06." [Pet. p. 13.] Examination of the statement shows that the assets consist almost wholly of "construction charges"—in other words the wells, canals, pipe lines, diversion and distribution works of the Dis-

trict capitalized at cost. These present no evidence of ability to pay nor can such assets be taken for the debts of the District. Brief of petitioners (p. 29) suggests value of the lands within the District as an asset and as evidence of solvency. But these lands could only be acquired through the process of assessment and inability of the landowner to pay could only result in continually mounting assessments on the paying acres, and a complete lack of market for the delinquent acres.[11]

Practically, and in the final analysis, there is but one source from which any creditor of the District may expect payment—income from the lands within the District. Ability to pay arises solely from this source and ability to pay determines the fairness of the plan.[12] Measured

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(11) *Provident Land Corporation v. Zumwalt* (1938), 12 Cal. (2d) 365, 85 P. (2d) 116, at 118:

"If delinquency occurs a higher assessment may be levied thereafter to make up the loss, and meanwhile the district may proceed to sell the land of the delinquent owner and buy it in. If a heavy delinquency occurs, the remaining land bears a correspondingly heavy burden, for every parcel is liable ultimately for the entire bonded indebtedness, and assessments may therefore be 'pyramided' on the land which is not in default. * * * Moreover, there were no purchasers for the lands taken in by the districts, because a new landowner would immediately become liable for assessments, which could be pyramided to any extent."

(12) Douglas—Democracy & Finance (1940), p. 226:

"The capacity of a debtor municipality or taxing district to pay, which is the supposed basis of any fair plan, is at best a matter of very technical estimate based on a great many problematical future variables. Even assuming possession of all the facts as of a certain date bearing on this capacity to pay, there is nevertheless always room for a very wide difference of estimates when that is projected over a future period of years."

by this test the record abundantly establishes that what the plan offers is all that the bondholders could reasonably expect to receive. It is submitted that the petition should be denied.

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Due service of the within Brief is hereby acknowledged this.....day of January, A. D. 1941.

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Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1940
No. 698

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Petitioners,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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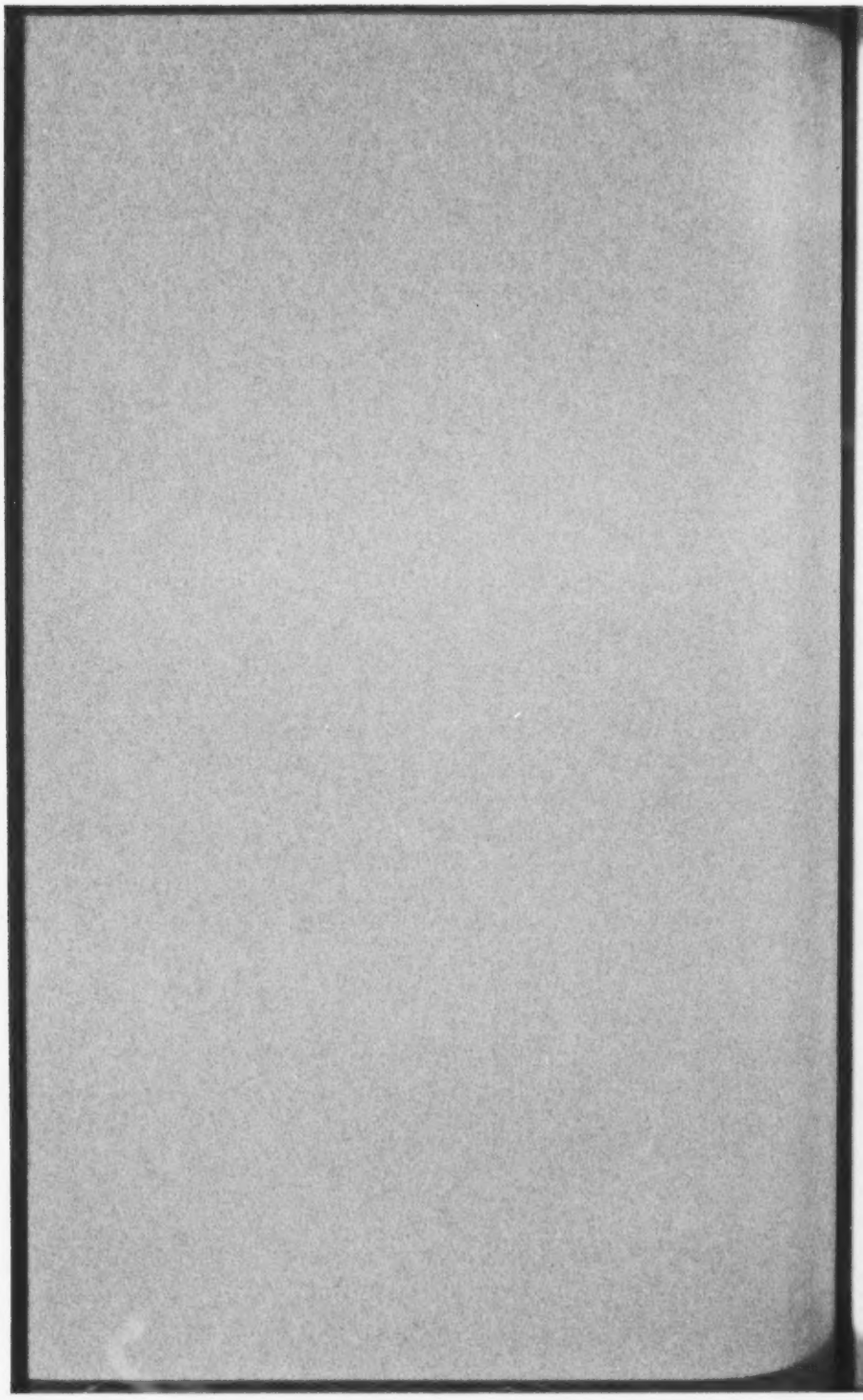

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Petitioners,

vs.

PALO VERDE IRRIGATION DISTRICT, an Irrigation District,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Statement of the Case.

Respondent, a California irrigation district, after undergoing a complete financial collapse, filed its petition for relief under present Chapter IX of the Bankruptcy Act. Its plan of composition was confirmed by the District Court [R. 134]. The interlocutory decree was affirmed by the Circuit Court of Appeals on September 20, 1940 [R. 378],

after an unusually exhaustive four-day argument of this and the following four companion cases:

West Coast Life Ins. Co. v. Merced Irrigation District, 114 F. (2d) 654. (Cert. denied Jan. 6, 1941, 85 L. ed. Adv. Op. 345) hereinafter called the "Merced" case;

Newhouse v. Corcoran Irr. Dis., 114 F. (2d) 690. (Cert. denied Jan. 6, 1941, 85 L. ed. Adv. Op. 345) hereinafter called the "Corcoran" case;

Moody v. James Irr. Dist., 114 F. (2d) 685. (Pet. for Cert. pending);

Bekins v. Lindsay-Strathmore Irr. Dist., 114 F. (2d) 680. (Pet. for Cert. pending).

Petition for rehearing was denied by the Circuit Court of Appeals on October 15, 1940 [R. 437]. Petitioners seek certiorari. Respondent respectfully submits that, after eliminating from the petition the grounds for certiorari which have been settled adversely to petitioners by this Court's denial of the writ in the *Merced* and *Corcoran* cases, *supra*, the petition discloses no reason, sufficient under Rule 38 and the practice of this Court, for which the writ should be granted.

The Essential Facts.

Palo Verde Irrigation District comprises 95,000 acres of alluvial river-bottom, riparian to the Colorado River in the easterly end of Riverside County, California [R. 4, 184]. The river lies on a plane above the valley. The climate is hot, with summer temperatures up to 122 degrees and arid, with average annual rainfall between two and three inches [R. 188]. In 1908 a Mutual Water Company laid out a canal system to irrigate the valley and a rudimentary levee to protect it [R. 185].

Gradual rising of the bed of the river led to floods in the valley and forced the organization in 1915 of a levee district and its issuance of bonds to construct extensive levees along the thirty-five mile river-front. The river bed continued to rise and floods recurred, the most disastrous of which, in 1922, inundated two-thirds of the valley [R. 185, 186].

In 1921 the pressure of water from the rising river caused a dangerously high water table in the valley, hence a drainage district was organized and bonded itself to construct a drainage system, so that farming might go on [R. 185].

For the purpose of reducing expense and coordination of effort, respondent irrigation district was formed in 1923, pursuant to a special act of the California legislature (Stat. Cal. 1923, p. 1067) which authorized the merger into respondent of the levee and drainage districts and its acquisition of the Mutual Water Company's irrigation system, but is otherwise patterned on the California Irrigation District Act. Respondent assumed the bonds of the three old entities and issued further bonds to reconstruct the broken levees and com-

plete the canal system. Respondent comprises all lands in the levee and drainage districts, which were practically coterminous [R. 4, 186].

The peak acreage in cultivation, in 1926, was 36,135 acres [R. 257]. To meet the district's load of debt, its tax rate steadily mounted, in 1928 and 1929 to around $17.00 per $100.00 assessed valuation [R. 258]. The farmers, paying out more than they took in from their crops, borrowed on any credit they had and paid until their credit was exhausted [R. 312]. Then they drifted from the land until in 1933 the acreage farmed had dwindled to 21,117, 58% of the maximum [R. 257].

The land delinquent for district taxes mounted as follows:

1927,	26.37	per cent
1928,	31.49	" "
1929,	55.76	" "
1930,	97.38	" "
1931,	99.28	" "
1932,	99.21	" " [R. 258].

In 1930 the district defaulted on its bonds, which totaled $4,174,330.36 [R. 194]. It energetically reduced its operating expenses by more than half and continued operations by collecting water tolls from the residue of the farmers remaining on the land [R. 252]. It unsuccessfully sought aid from Congress [R. 194, 195], but finally in 1934 obtained a conditional commitment for a loan from Reconstruction Finance Corporation (hereinafter called R. F. C.) [R. 201]. R. F. C. purchased from former

holders 96.76% of the bonds [R. 224]. Petitioners, on the other hand hold 1.88 per cent [R. 58, 59].

The market price of Palo Verde bonds in 1930 and 1931 was 10 to 14. From 1931 to 1933 it declined to 2 [R. 151].

After filing a proceeding under Section 80 of the Bankruptcy Act, dismissed because of unconstitutionality [R. 295, 298] the district commenced a proceeding under a state refinancing act, dismissed by the district [R. 148, 149] and finally the instant proceeding. On a full showing by the district, including testimony by qualified experts and practical farmers to facts supporting the fairness of the plan of composition and that it provided the limit for the bondholders that the land could bear [R. 286 to 324] and with practically no evidence offered by the bondholders, the District Court confirmed the plan.

The district has vigorously proceeded to restore its tax deeded lands to taxpaying. It comprises 95,000 acres. It has sold 49,000 acres to the former owners and up to 1937 an additional 4,500 acres to others, at auction [R. 271, 274]. The area in cultivation, by 1937, had been brought back to 32,000 acres [R. 253].

At the time of the trial, if the district were mandamused to levy a tax to pay all matured principal and interest on its bonds, $2,954,817.51, the tax rate necessary would be $112.17 per $100.00 assessed valuation [R. 267]. If this levy were paid in full the remaining debt would be $3,242,830.36 and the tax rates for the next eight years would be from $12.00 to $15.00 per $100.00 [R. 268]. Under such circumstances "there would be no farming at all. The farmers would abandon their places wholesale and try to get them a job" [R. 314].

ARGUMENT.

I.
The Issue.

The issue before the Court is whether or not the writ of certiorari should be granted. This brief is limited to that question. The merits of petitioners' claims of error are not involved and will not be discussed, except to illustrate their nature, as relating to the question whether the writ should issue.

II.
Grounds for Issuance of Writ.

Rule 38, Section 5 states the grounds for the issuance of certiorari to a Circuit Court of Appeals:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> " . . . . . .
>
> "(b) (1) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; (2) or has decided an important question of local law in a way probably in conflict with applicable local decisions; (3) or has decided an important question of federal law which has not been, but should be,

settled by this court; (4) or has decided a federal question in a way probably in conflict with applicable decisions of this court; (5) or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." (Numbers in parenthesis supplied.)

Ground (1) Petitioners do not pretend that the decision of the Circuit Court of Appeals herein is in conflict with those of other circuit courts of appeals. In fact, all the decisions on Chapter IX of the Bankruptcy Act have been strikingly consistent.

5TH CIRCUIT:

American National Bank of Nashville v. City of Sanford, 112 F. (2d) 435 (cert. denied October 14, 1940, 85 L. Ed. Adv. Op. 70);

Davis v. City of Homestead, 112 F. (2d) 438 (cert. denied October 14, 1940, 85 L. Ed. Adv. Op. 70);

Vallette v. City of Vero Beach, 104 F. (2d) 59 (cert. denied 308 U. S. 586);

Supreme Forest v. City of Belton, 100 F. (2d) 655;

Getz v. Edinburg, 101 F. (2d) 734 (pet. for cert. dismissed on motion of petr., 308 U. S. 628).

8TH CIRCUIT:

Leuhrmann v. Drainage Dist. #7, 104 F. (2d) 696 (cert. denied, 308 U. S. 604).

9TH CIRCUIT:

West Coast Life Ins. Co. v. Merced Irrigation District, 114 F. (2d) 654 (cert. denied, 85 L. Ed. Adv. Op. 345);

Newhouse v. Corcoran Irr. Dist., 114 F. (2d) 690 (cert. denied, 85 L. Ed. Adv. Op. 345);

Moody v. James Irr. Dist., 114 F. (2d) 685 (pet. for cert. pending);

Bekins v. Lindsay-Strathmore Irr. Dist., 114 F. (2d) 680 (pet. for cert. pending);

Jordan v. Palo Verde Irr. Dist., 114 F. (2d) 691;

Fano v. Newport Heights Irr. Dist., 114 F. (2d) 563 (plan rejected as unfair).

Ground (2) Nor do petitioners assert that the court below has decided any question in conflict with applicable local decisions.

Ground (3) Petitioners do intimate (Petition, p. 17) that the court below has decided important questions of federal law which have not been, but should be, settled by this Court.

Ground (4) They do not contend that the decision below on a federal question conflicts with any decisions of this Court.

Ground (5) Nor do they contend that there has been any departure from "the accepted and usual course of judicial proceedings".

III.

Reasons for Issuance Claimed by Petitioners.

The reasons asserted by petitioners for the granting of the writ are nine (Petition, pp. 14 to 17). We examine these nine points in the light of Rule 38, above quoted.

1. Petitioners contend that the bankruptcy power cannot extend to respondent district because its functions are exclusively governmental. It is argued that recent decisions of the California Supreme Court as to the governmental character of such districts exclude respondent from the jurisdiction of Congress and the Federal Court in bankruptcy. This point was raised in the *Merced* case (Petitioners' Brief, Point XI) and in the *Corcoran* case (Petitioners' Brief, Point V) and denied by this Court. The last decision of the Supreme Court of California is wholly in accord with the decisions of this Court in the *Merced* and *Corcoran* cases and in *United States v. Bekins,* 304 U. S. 27.

Peoples State Bank v. Imperial Irr. Dist., 15 Cal. (2d) 397, 399, 402, decided April 16, 1940.

2. Petitioners contend that *res judicata* applies, by reason of the decision in the respondents' first bankruptcy case. The precise point was raised in the *Merced* case (Petitioners' Brief, Point VI) and denied by this Court.

3. Petitioners argue that R. F. C. is a pledgee and not an owner of bonds and therefore could not vote for the plan of composition. The same point was raised in the *Merced* case (Petitioners' Brief, Points VII and VIII) and in the *Corcoran* case (Petitioners' Brief, Point III) and was denied by this Court.

4. Petitioners raise the bar of an action pending under state law. The same contention was raised in the *Merced* case (Petitioners' Brief, Point X), and denied by this Court.

5. Petitioners say that a plan is not fair "which seeks to pay less than the amount of the principal where the assets exceed the debts." This identical point was raised in the *Merced* case (Petitioners' Brief, Points III (g) and V) and denied by this Court. They further argue that "where there are no remaining landowners," the creditors should get all the assets—presumably, the land itself. It is not true, as petitioners assert, that the District owns all of the land. In the years intervening since it took tax title to 99% of the land, it has resold to the former owners and others, for nominal amounts, 53,500 acres of the 95,000 acres in the District [R. 271, 274]. They also urge that the plan is not fair because it does not cover overlapping county and city bonds. The same contention was made as a claim of unconstitutional discrimination in the *Corcoran* case (Petitioners' Brief, Point II) and was denied by this Court. In other contentions raised by the petitioners in their brief under this head they merely dispute the findings of the two lower courts on various elements of conflicting evidence.

6. Petitioners contend that the plan is not fair because it offers to all creditors 24.81 cents per dollar and holders of $170,000 of claims were actually paid 50 cents on the dollar. Petitioners misconstrue the facts. The bondholders referred to held bonds of the Mutual Water Company, which had been assumed by respondent, and which were secured by that private corporation's trust deed. They had, therefore, an entirely different remedy by foreclosure than the holders of District bonds. On this account the latter voluntarily sold their bonds to Reconstruction Finance Corporation for 23.248 cents per dollar, thus allowing a differential which built up the payment to the Mutual Water Company bondholders to 50 cents per dollar. This was purely a matter of agreement [R.

223, 224]. It had no bearing upon the plan or the proceedings in this composition case, which were uniformly based upon the figure of 24.81 cents per dollar. This was the average of the amounts disbursed by R. F. C. to all bondholders whose bonds it purchased. No discrimination has, therefore, been practiced upon any bondholder by the Court.

7. Petitioners urge that the plan was not in good faith, because respondent "contributed to the purchase" of the bonds by R. F. C. This is pure distortion of evidence. What respondent did was to pay the incidental expenses of the escrow in which the bonds were transferred to R. F. C. [R. 177]. R. F. C. paid the purchase price.

8. Petitioners argue that because a public trust is involved, the bankruptcy court could not make any decree. If so, the Municipal Composition Act would be a nullity, and this Court has held it was not. They also insist that since two of them have gained certain judgments on bonds from which appeals are pending, and an alternative writ of mandate, in a case which has never gone to trial, they have untouchable vested rights. The contrary is held in *Vallette v. City of Vero Beach,* 104 F. (2d) 59 (cert. denied, 308 U. S. 586).

9. Petitioners argue that their pleading of objections in the trial court is a sufficient foundation, without presentation of argument thereon to the trial court, to entitle them to claim error in the Circuit Court of Appeals. In its opinion herein, the Circuit Court of Appeals remarks that nine of the fourteen grounds for reversal urged in that court were not urged in the trial court. Nevertheless, it meticulously proceeds to examine and rule upon each of the fourteen points. Petitioners have had their day in court.

IV.

Petitioners' "Reasons" Are Insufficient.

The nine reasons urged by petitioners are described by them (Petitioners' Brief, p. 17) as "of great importance as affecting the proper administration of the Municipal Bankruptcy Law." They are therefore urged solely under the third ground stated in Rule 38, Section 5, Subdivision (b). Points 1, 2, 3, 4 and part of 5 have been settled by this Court in denying certiorari in the *Merced* and *Corcoran* cases. The remaining points are mainly based on the peculiar facts of the instant case. None of them presents a situation which is involved in a great number of cases or is likely to be so involved in the future. None has any general, widespread or basic public importance.

As Chief Justice Taft said, in *Magnum Importing Co. v. Coty*, 262 U. S. 159, 163, "The jurisdiction to bring up cases by certiorari from a circuit court of appeals was given for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The points relied upon by petitioners which have not been ruled on by this Court are points in ordinary litigation, resting upon and limited to the particular facts of the individual case, for which the Circuit Courts of Appeals "are, and must be, courts of last resort, . . .," Frank-

furter and Hart, 48 Harvard Law Review, 238, 260, *et seq.* They do not possess the character of "importance" which will move this Court to take jurisdiction. The application for certiorari is one of the 80% of such applications made with what the Chief Justice has called "an utter absence of any good reason for asking our review," Hughes, C. J., address before American Law Institute, 20 American Bar Assn. Journal, 341.

The writ should not issue when its purpose would be merely the re-examination of questions of fact under conflicting evidence or the scrutinizing of the Circuit Court's application of settled rules of law thereto. It is respectfully submitted that the petition should be denied.

ARVIN B. SHAW, JR., and
WM. L. MURPHEY,
of
STEWART, SHAW & MURPHEY,
Counsel for Respondents.

Due service of the within Brief is hereby acknowledged this.....day of February, A. D. 1941.

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Attorneys for Petitioners.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Martin Bekins, deceased; MILO W. BEKINS and REED J. BEKINS, as trustees, appointed by the will of Katherine Bekins, deceased; JAMES IRVINE, J. R. MASON, JAMES H. JORDAN, A. HEBER WINDER, as trustee of Eva A. Parrington Trust; C. A. Moss, and H. E. CURTIS, creditors of Lindsay-Strathmore Irrigation District,

Petitioners,

vs.

LINDSAY-STRATHMORE IRRIGATION DISTRICT, an insolvent taxing agency,

Respondent.

No. 696

JAMES H. JORDAN, J. R. MASON, L. F. ABADIE, GEORGE F. COVELL, and FIRST NATIONAL BANK OF TUSTIN (a corporation),

Petitioners,

vs.

PALO VERDE IRRIGATION DISTRICT, an irrigation district,

Respondent.

No. 698

PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Comes now petitioner J. R. Mason, the owner of some bonds of respondents, appearing in propria persona and respectfully submits this, his petition for a rehearing in the above entitled causes.

Your petitioner is a layman, who subscribes to the quotation from "The Rights of Man", by Thomas Paine, as follows:

> "The end of all political associations is, the preservation of the rights of man, which rights are liberty, property, and security; that the nation is the source of all sovereignty derived from it: the right of property being secured and inviolable, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity."

POINT I.

Among the objections raised in the Courts below, the chief question presented is, in the opinion of this petitioner, as follows:

> "Where a State has created a Governmental **Single-Tax** 'Enclave', and empowered it to contract and exercise the power of direct taxation upon the value of land, without limitation as to rate, amount or time, to whatever extent may prove necessary to meet its contracts, can such power once given be withdrawn until the contract is satisfied, even when, as here, the State

Supreme Court has decided that the power given Respondents and all their property constitute a 'Public Trust', owned by the State and immune from taxation, partition and execution?''

At the time this Honorable Court approved 11 U. S. C. A. 401-403 in *U. S. v. Bekins,* 304 U. S. 27, the California Courts had rendered a great many decisions, giving a wide variety of interpretations to the nature of irrigation districts, even going so far in one case as to hold them not to be political subdivisions. (*Wood v. Imperial I. D.,* 216 Cal. 748, 753.) The *Bekins* case, supra, was decided in April, 1938. On November 28, 1938, the California Supreme Court, with full knowledge of the extent of the Bekins ruling, decided four cases,* which reversed and clarified prior conflicting interpretations, and put respondents wholly outside the class eligible to come under 11 U. S. C. A. 401-403, if, under the separability clause in it, the contracts of any kind of state instrumentality are entitled to immunity.

**Provident Land Corp. v. Zumwalt,* 12 Cal. (2d) 365, 85 P. (2d) 116; *El Camino I. D. v. El Camino Land Co.,* 12 Cal. (2d) 378, 85 P. (2d) 123; *Clough v. Compton-Delevan I. D.,* 12 Cal. (2d) 385, 85 P. (2d) 126; *Moody v. Provident I. D.,* 12 Cal. (2d) 389, 85 P. (2d) 128; *Anderson-Cottonwood I. D. v. Klukkert,* 13 Cal. (2d) 191, 88 P. (2d) 685; *Glenn-Colusa I. D. v. Ohrt,* 31 Cal. App. (2d) 619, 88 P. (2d) 763; *Pac. Coast Jt. Stock Land Bank v. Roberts* (Dec. 1940), 1 Cal. Dec. 467. In *Bekins v. Heiken* (Dec. 7, 1940), 1 Cal. Dec. 258, the same court that issued *Clough v. Baber,* 38 Cal. App. (2d) 50, clarified that opinion, as follows:

"The latest case applicable here is *Clough v. Baber* (supra). There an irrigation district was involved, and the district was admittedly insolvent. The rule is there laid down supported by a long line of well-recognized authorities that when the debtor is insolvent and there are not sufficient funds with which to pay all obligations in full, and the power to raise funds by taxation *or otherwise* has been exhausted, then equity may order the accessible money prorated among the holders of all valid claims. Such a situation, however, does not here exist. We have no showing of insolvency (and such a status cannot be assumed except upon clear proof), and the power to raise funds by taxation or otherwise has not been exhausted."

In addition to ruling on November 28, 1938, that the functions of California irrigation districts are "exclusively governmental", and their bonds payable from unlimited ad valorem taxes, it was held that

> "the district may freely transfer, lease or otherwise deal with the lands, in so far as its *power* is concerned, but the *lands* remain in trust, and the district exercises its powers, however broad, as a trustee * * * it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust. * * * The land is the ultimate and only source of payment of the bonds. It can never be permanently released from the obligation of the bonds until they are paid. * * * Any practice which removes the land from its position as ultimate security for the bonds, or which places its proceeds beyond the reach of the bondholders, destroys that plan and is contrary to the spirit of the act." (*Provident Land Corp. v. Zumwalt,* 85 P. (2d) 116.) (November 28, 1938.)

> "It is clear that while it has been held in a number of cases, prior to the amendment of Sec. 52, supra, that a money judgment was proper to be entered against the district, and also necessary to prevent the bar of the statute after the lapse of four years, it is likewise clear that the entering of a money judgment against the district does not give to a bondholder any additional remedies in seeking to enforce the payment on matured bonds and coupons * * * The endorsement on the bonds and coupons by the treasurer of the district binds the district to pay that rate of interest whenever funds are available for such purpose. Thus the financial interests of the plaintiff are rendered exactly the same by the endorsement as it would

be after obtaining a money judgment * * * That the annual assessments and the sale of lands upon which the assessments are not paid may never realize sufficient money to pay the indebtedness of the district is entirely beside the question. The property of the district, so far as it owns any property, constitutes a public trust and is held by the district for a public use, and, therefore is not subject to levy and sale upon execution by a creditor of the district." (Citations.)

Moody v. Prov. I. D., 85 P. (2d) 128. (November 28, 1938.)

These decisions of the highest state Court, were followed by still later decisions, holding that all property, including land acquired by the district for unpaid taxes, and crops received in lieu of cash rent, are completely tax exempt (*Anderson-Cottonwood I. D. v. Klukkert,* supra, and *Glenn-Colusa I. D. v. Ohrt,* supra), which appear to clearly bring respondents under the same rule as was decreed by this Honorable Court in *N. W. University v. Miller,* 99 U. S. 309, and would seem to make it certain that Congress in 11 U. S. C. A. 401-403, Sec. 83(i) did not intend nor attempt to include such instrumentalities of a state as respondents, nor their contracts.

In none of the hearings in re 11 U. S. C. A. 401-403, nor in the remarks prior to its passage in Congress was there a suggestion it could apply except to districts that are "mere agents of the landowners and not of the State in the exercise of their powers", and to bonds secured by special assessments, limited both as to time and to benefits received, such as Arkansas

drainage districts are held by their Courts to be. None of the hearings show testimony taken from an actual working farm owner, who ever asked for the amendment. But, Mr. C. H. Scott, President, National Drainage Association, testifying on March 17, 1937, before the House Committee on the Judiciary said that the Farm Credit Administration would not purchase mortgages on land in districts in financial difficulty, until bonds ahead of the mortgages were scaled down.

The same conflict of interest exists in every county and city with bonds out. Given the power to "compose" the tax-secured bonds of local governments, encouragement would be given to all mortgage holders, ground rent collectors and like situated groups to open a drive on Congress to amend the act again, permitting involuntary as well as voluntary petitions, and omitting any consent by any creditors. There are, in fact, already whisperings that this is to be sought, soon. Your petitioner regards as ominous, in view of the strong charges of usurpation of state rights made by 41 states in the *New River* case, decided December 16, 1940, that no state official has appeared to criticize or oppose the original Chapter IX or the present amended Chapter IX in any of the hearings, or the petitions filed by any local government. (Per contra, see brief for rehearing in No. 859, October term, 1935, filed by ten states. Dated September 23, 1936.) Knowing that Congress is, in effect without power to levy direct taxes (*Pollock v. Farmers L. & T. Co.*, 157 U. S. 429) the total absence of objection from state

officials to letting Congress have the power to regulate the state's contract to collect direct taxes, is clear proof that powerful groups are sympathetic to any move to regulate this power of the state.

When Congress authorized the R. F. C. to refinance respondents, it recognized that some persons would desire to hold their bonds to maturity or until paid. The fact that Congress provided that a loan could be made to any district, when owners holding a mere majority had consented to accept the price offered, makes it clear that the subsequent efforts in both the federal and state Courts have not been necessary. If any private interests had employed similar coercive schemes to compel a local government to honor none of its bonds, except those held by the group, until they had acquired all the bonds, at their price, how would that be any different from the instant case? In the case of Oakdale Irrigation District, the R. F. C. allowed over a million dollars of 5% bonds (now quoted at 113 bid) to remain out, after "co-operating" with the same district in "refinancing" most of that district's bonds at 50 cents, flat, even including 6% bonds. The prices being demanded for land in that district from homeseekers today are so high that few can afford to buy. Thus, no "scale down" of such bonds serve to benefit any homeseeker, but only to take property rights from the investors in public bonds to enrich mortgage and land holders. Neither can such "refinancing" benefit any tenant or "share cropper". It will enable a working farm owner to have more money to pay a mortgage, but is that not

equally true in every community with bonds out? Your petitioner is deeply sympathetic with the plight of overmortgaged citizens in both country and city, and has long believed that there must be a drastic write down in such mortgages. But, he also believes that no group of citizens should be allowed to succeed in forcing down the mandatory tax rate, whether directly or indirectly as is being sought here, when the rule of law is the opposite, when any one citizen seeks debt relief. Section 64(a) General Bankruptcy Act.

In brief, if groups can achieve such private enrichment, it would be no more "revolutionary" to amend the other sections of the act to permit any citizen unable to meet his debts, to pay private creditors, *before* taxes.

An argument to the effect that because other citizens have chosen to surrender rights guaranteed them under our Declaration of Independence and Bill of Rights, and taken whatever was offered proves the "fairness" of any repudiation of a contract, and makes it unjust for Petitioner to seek to protect not alone his rights, but those of the sharecroppers, tenants and even the citizens still less fortunate, who also have rights, is no more valid than to argue that because a majority had consented to surrender any other rights, guaranteed under our Constitution, your Petitioner should be compelled to do likewise.

The Court may take judicial notice that in no instance has any Court below in California so much as questioned the figure, set by the R. F. C., or suggested it be changed up or down, by a fraction of one cent.

It is as impossible for any creditor to prove the ability of respondents to pay, as it would be to prove the ability or inability of any county or city to pay its debts. If there is any "measuring rod", your petitioner has never heard of it being even discussed in any proceedings under Chapter IX.

That the levy and collection of such taxes by the states was understood to be "independent and uncontrollable" in the "most absolute and unqualified sense", is stated by Hamilton in Federalist Essay No. XXXII. Also see Nos. XXXI, XLIV/XLVI. Thus, by denying this petition, will not the way be opened for Congress to pass even such an act as was passed in England by Parliament in 1660 (12 Charles II., c. 23) and which exempted landed property from the dues previously payable to the state, and shifted the costs of government over to the rent racked tenants of the feudal lords in both city and country? The events, both abroad and at home, during recent years involving "usurpation" of one kind or another, seem to make it imperative, as perhaps never before that the precise line of partition between the power of the general and state governments to levy direct taxes be either re-affirmed as in *Ashton v. Cameron County W. I. D.,* 298 U. S. 513, or more clearly marked than it is in the *U. S. v. Bekins* case, supra.

The "Royal Commission of Dominion-Provincial Relations", reported its findings to the Canadian Government in 1940, in three large volumes. Although recognizing the serious plight of municipalities in Canada, it is nowhere even suggested that any juris-

diction can be vested in the Dominion, but declares that exclusive power resides in the Provinces.

That tax defaulted real estate, and neglect, failure and refusal by most, if not all the states to deal effectively with it, constitutes a problem that can not longer be safely blinked at, is proven in reports of planning and tax commissions in many states. An example is the 400 page 1939 report by the Illinois Tax Commission, which shows that such delinquencies in Illinois and adjoining states are very large, and as one witness said (p. 197) "tax delinquency in Cook County is its Number One Problem".

Your petitioner is not certain whether the **Single-Tax** nature of the amendment to Section 35 of the act under which the bonds of respondent Lindsay-Strathmore District were issued (Stats. 1909, p. 461) has been clearly understood by this Court. Under this amendment, the revenues necessary for the district to levy for expenses are derived from taxes, on the *value* of the land only. Such taxes or assessments are not levied according or limited to benefits. (*Judith Basin I. D. v. Malott,* 73 F. (2d) 142.) If not paid within 3 years, title to the land passes to the district "free of all encumbrances". (Sec. 48.) The district has also full power to rent land. (Sec. 47.) That such a state "Enclave" is not contrary to the letter or spirit of our form of government is discussed in *Fairhope Single Tax Colony v. Melville,* 69 So. 466; (*Henry*) *George v. Braddock,* 18 A. 881; *State v. Amana Soc.,* 109 N. W. 894. These cases were long and bitterly contested.

All economists now agree with the conclusion in the unanimous decision by this Court in the *Pollock* cases, supra, that a landlord can not shift a tax on ground rent to a tenant or anybody else. They further agree that such a tax can in no way add to costs of production, nor cause inflation, nor lessen the buying power of non-land owning consumers. But such taxes do force those holding land for speculation to improve or sell it to some one that can and will.* There is no obligation for any man to hold title to land he thinks too heavily taxed, nor can a district get more than the rental value for its land.

> "A landlord is entitled to insist that his lease be either rejected or fully assumed, under the plan."
>
> *Monk Realty Co. v. Wise Shoe Stores,* 111 F. (2d) 287, 290 (1940).

The Oakdale Board of Trade said five years after this amendment:

> "The Single Tax has made a great difference for the betterment of the Oakdale Irrigation District. * * * Many say they can now afford to borrow money and make improvements which they could not do under the old system. We invite farmers to come and settle among us. Their in-

*"A tax on rent falls wholly on the landlord (and mortgage holder). There are no means by which he can shift the burden upon anyone else."
"Principles of Political Economy," by John Stuart Mill.
See also "Wealth of Nations" by Adam Smith, Book V, Ch. 2, part 2, art. 7; "Social Statics", by Herbert Spencer (1851 Ed.), Chap. IX, "The right to the use of the Earth"; "Elements of Social Science", by Patrick Edward Dove (1854), Part II; "Principles of Economics", Taussig, 3rd Revised Edition, page 540; "Progress and Poverty", by Henry George, Book VII, Chap. 2, pars. 1-5, and Book IV, Chap. 2, par. 10 et seq.; "Condition of Labor", by Henry George, Sec. 1, first footnote.

> dustry will not be taxed. Our Single Tax system encourages industry. We make the man who keeps his land idle pay the same tax as the man who improves. Those who build up our community and create its wealth will not be penalized."

In addition to the attack against this act in *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112 (1895), when Attorney Maxwell warned this Court,

> "It is communism and confiscation under guise of law"

there were almost unceasing attacks brought, especially after Stats. 1909, p. 461. But this amendment was upheld in *Mordecai v. Supervisors,* 183 Cal. 434.

In 1919 the act was further amended to permit the districts to generate and distribute electric energy, and to issue revenue bonds. (Stats. 1919, p. 778.) In 1932 the Irrigation Districts Assn. of California warned through its secretary Mr. Walter D. Wagner that the same utility interests which opposed the Boulder Dam and All-American Canal,

> "are now attempting to throw the (Imperial) District into default; they are handicapping the Board of Directors in every way possible, and are apparently influencing the banks to indirectly and perhaps inadvertently aid them in their nefarious scheme. They are willing to wreck everything and everybody in order to prevent that electric power (on All-American Canal) being generated by the District. * * * The attempt of these interests to wreck the district and the 62,000 people in it, is dastardly * * *." (Fresno Bee, May 12, 1932.)

This power question was decided in *Nev.-Cal. Elec. Co. v. Imperial I. D.,* 85 F. (2d) 886. Hearing denied by this Court.

The Christian Science Monitor, June 14, 1934, page 1, in a special wireless from Madrid, tells about the struggle by Catalonia, Spain, to get a law similar to the law creating respondents. It tells that Spain's highest Court at Madrid had the week before declared unconstitutional such a law enacted by Catalonia, and that the state had then enacted another one, which is "not favored by the central government because it splits Catalonia into small farms, advantageous to small holders". This incident, it is claimed, was the main spark which started the civil war in Spain.

The Hearings (4 volumes) of the House Interstate Migration Committee, printed pursuant to H. Res. 63 and 491, and such books as "Factories in the Fields", and "Grapes of Wrath", disclose a concentration of land holdings which the constitution of Cal. Art. XVII, Sec. 2 (1879), (the same year "Progress & Poverty" appeared), so clearly denounced as being "against the public interest".

Abraham Lincoln, in a letter to his law partner Gridley said:

> "The land, the earth that God gave to man for his home, his sustenance and support, should never be in the possession of any man, corporation, society, or unfriendly government, any more than the air or water, if as much. An individual company or enterprise requiring land should hold no more in their own right than is needed for their home and sustenance, and never more than they have in

actual use in the prudent management of their legitimate business, and this much should not be permitted when it creates an exclusive monopoly. All that is not so used should be held for the free use of every family to make homesteads, and to hold them so long as they are so occupied. A reform like this will be worked out some time in the future. The idle talk of foolish men * * * will find its way against it, with whatever force it may possess, and as strongly promoted and carried on as it can be by land monopolists, grasping landlords, and the titled and untitled senseless enemies of mankind everywhere."

("Abraham Lincoln, The men of his time", Robt. H. Browne, Vol. II, p. 89.)

Lord Thos. B. Macauley in his famous letter of May 23, 1857 said:

"I have long been convinced that institutions purely democratic must sooner or later, destroy liberty, or civilization, or both * * * You may think your country enjoys an exemption from these evils. I will frankly own to you that I am of a different opinion. Your fate, I believe to be certain, though it is deferred by a physical cause. As long as you have a boundless extent of fertile and unoccupied lands, your laboring population will be far more at ease than the laboring population of the Old World * * * But the time will come when New England will be as thickly populated as Old England. Wages will be low; and will fluctuate as much with you as with us * * * Then your institutions will be fairly brought to the test * * * As I said before when a society has entered on this downward progress, either civilization or liberty must perish. Either some

Caesar or Napoleon will seize the reins of government with a strong hand or your republic will be as fearfully plundered and laid waste by the barbarians in the 20th century as the Roman Empire was in the fifth—with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without and that your Huns and Vandals will have been engendered within your own country, by your own institutions."

(Littels Living Age, May 19, 1860.)

"While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation." Chief Justice Taney in *Charles River Bridge v. Warren Bridge,* 11 Pet. 419.

"Here (Sicily), in the end, Rome laid her mortmain upon Greek Phoenician, and Sikelot alike, turning the island into a granary and reducing its inhabitants to serfdom."

(Italy and Greece by J. A. Symonds, page 143.)

"Men, too often in their revenge set the example of doing away with those general laws to which all alike can look for salvation in adversity." *Thucydides,* 426 B. C.

POINT II.

While petitioner has devoted himself mainly to the basic constitutional question because of the fundamental importance thereof, petitioner submits that the point he is about to present is a most important point of law involved in this case.

On the question of whether the R. F. C. is a creditor "affected" by the plan, your petitioner again urges that the Court below erred in holding that it is.

In support of this view he submits the able opinion of the learned trial judge in the recent case of *Texas Agricultural Assn. v. Hidalgo County W. C. & I. District,* 36 F. Supp. 314 (decided on rehearing Feb. 10, 1941):

> "While under the statute the R. F. C. has the right to be considered as a creditor, for the whole amount *for voting purposes* (citations), yet a construction of the contract with R. F. C. as a whole clearly shows that the District's indebtedness is not the amount of the original, old securities, but only in the amount of the disbursements actually made by R. F. C. under its loan."

Unless the contract between R. F. C. and respondents differs essentially from that with this Texas district, which your petitioner believes it does not, this very important point which was so carefully studied in *American United Mutual Life v. Avon Park,* No. 31, October Term, 1940 (decided Jan. 1941), should be thoroughly investigated by this Honorable Court, because it has never before been squarely and clearly discussed in any of the other opinions, in the Courts below, so far as your petitioner is aware.

That there is uncertainty in the Courts below, and a serious necessity that the question presented be resolved by this Court is evidenced by the conflicting judgments in *Central R.R. of N. J. v. Martin,* 115 F. (2d) 968 and *Arkansas Corp. v. Thompson,* 116 F.

(2d) 179; *In re Mission School District,* 35 F. Supp. 37 and 116 F. (2d) 175.

Because the Court in *U. S. v. Bekins,* supra, did not explicitly overrule or reverse the *Ashton* case, supra, a rehearing and opinion that would resolve the existing confusion, would save much uncertainty, and time of the Courts below, which conflict now threatens utter chaos in many local governments, and increasing demands for undemocratic legislation.

The nation-wide importance of the issue, is one of the reasons why your petitioner submits this urgent plea for a review, and that writs of certiorari may issue out of and under the seal of this Honorable Court, as prayed for in the petitions for writs of certiorari herein.

Dated, San Francisco, California,
March 7, 1941.

Respectfully submitted,
J. R. MASON,
In Propria Persona.

CERTIFICATE OF PETITIONER.

I hereby declare that the foregoing petition for a rehearing is submitted in good faith and is not interposed for delay.

Dated, San Francisco, California,
March 7, 1941.

J. R. MASON,
In Propria Persona.